Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

PHILIPPE SAUVAGE,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's *in abstentia* conviction in France and five-year prison sentence for engaging in religious activities which would be wholly protected under the First Amendment of the United States Constitution and well-established international laws amounts to "persecution" and a "threat" to Petitioner's "freedom" under the Immigration and Nationality Act (INA) §§ 208, 243(h), 8 U.S.C. §§ 1158, 1253(h) (1994), such that he should be considered a "refugee" under INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A), and eligible for a grant of asylum and withholding of deportation?

2. Whether the Court of Appeals erred in refusing to remand this case so that the Board of Immigration Appeals could consider new evidence showing that Petitioner not only faced a "potential" criminal charge in France relating to his religious activities, but in fact had been convicted *in abstentia* and sentenced to five years in prison for religious activities a United States District Court determined in a final judgment were fully protected by the right to freedom of religion?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE 1

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED IN THE CASE .. 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 2

ARGUMENT 12

A. Applicable law on asylum and withholding: "prosecution" versus "persecution" 13

B. Persecution "on account of Religion" 18

C. The "well-founded" fear of persecution and the "clear probability of persecution" standards 25

D. The Court of Appeals should have remanded for further proceedings and consideration of Petitioner's conviction and sentence 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Bastanipour v. INS, 980 F.2d 1129 (7th Cir. 1992)..18, 21

Chen v. INS, 95 F.3d 801 (9th Cir. 1996).....14, 19

Coriolan v. INS, 559 F.2d 993 (5th Cir. 1977)..... 17

Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993).. 13, 25, 26, 27

In Re Petition of France for the Extradition of Philippe Sauvage, United States District Court for the Southern District of California, Cv. No. 92-4160 (Feb. 10, 1993)..... 3

INS v. Cardoza-Fonseca, 480 U.S. 421, 94 L. Ed. 2d 434, 107 S. Ct. 1207 (1987)..... 13, 15, 16, 25

INS v. Elias-Zacarias, 502 U.S. 478, 117 L. Ed. 2d 38, 112 S. Ct. 812 (1992)..... 18, 20, 21, 25

Kovac v. INS, 407 F.2d 102 (2d Cir. 1969)..... 14

M.A. v. INS, 899 F.2d 304 (4th Cir. 1990)..... 14

Marincas v. Lewis, 92 F.3d 195 (3d Cir. 1996)..... 16

Matter of Acosta, 19 I&N Dec. 211 (BIA 1985).....14, 27

Matter of Janus and Janek, 12 I&N Dec. 866 (1968)..... 17, 24, 28

Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).... 25

Osorio v. INS, 18 F.3d 1017 (2d Cir. 1994) 16, 24

Perkovic v. INS, 33 F.3d 615 (6th Cir. 1994)..... 21

Si v. Slattery, 864 F. Supp. 397 (S.D.N.Y. 1994)..... 19

Sovich v. Esperdy, 319 F.2d 21 (2d Cir. 1963).....15, 17

United States v. Ballard, 322 U.S. 78 (1944)..... 26

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Immigration and Nationality Act § 208 19

Immigration and Nationality Act § 208(a) ... 13, 14, 15, 25

Immigration and Nationality Act § 241(b)(3)(A) 2

Immigration and Nationality Act § 243(h) (1994) 13, 14, 15, 25

Immigration and Nationality Act § 243(h)(1) 13

8 U.S.C. § 1101(a)(42)(A) 1, 13

8 U.S.C. § 1105a(a) (1994) 2

8 U.S.C. § 1158(a) (1988 & Supp. 1992) 13

8 U.S.C. § 1253(h) (1994) 13, 28

8 U.S.C. § 1253(h)(1) 25

28 U.S.C. § 1746 10

European Convention on Human Rights 20, 26

International Covenant on Civil and Political Rights 26

International Helsinki Federation for Human Rights, Vienna, Austria, Annual Report 1999, France, Religious Tolerance 22

Religious Minorities and Growing Government Intolerance, Hearing before the Commission on Security and Cooperation in Europe, June 8, 1999 27

TABLE OF AUTHORITIES – Continued

Page

United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination on Religion or Belief 19, 26

U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 16

United Nations Declaration of Human Rights 26

United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status 16, 17

U.S. Department of State, Annual Report on International Religious Freedom for 1999: France ...22, 27

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

1. Written Decision of the Immigration Judge, March 3, 1995
2. Decision of the Board of Immigration Appeals, Sept. 22, 1997
3. Decision of the Board of Immigration Appeals, June 15, 1998
4. Memorandum of the Ninth Circuit Court of Appeals, October 21, 1999
5. Order of the Ninth Circuit Court of Appeals, March 3, 2000

STATEMENT OF JURISDICTION

The final Orders sought to be reviewed are the March 3, 2000, Order of the Ninth Circuit Court of Appeals denying Petitioner's motion to stay consideration of the petition for rehearing and denying Petitioner's motion for reconsideration and suggestion for rehearing en banc, and the Court of Appeals' affirming the Board of Immigration Appeals ("Board") issued on October 21, 1999.

28 U.S.C. § 1254(1) permits review of the Order and Memorandum of the Ninth Circuit Court of Appeals on a writ of certiorari.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED IN THE CASE

Immigration and Nationality Act (INA) § 101(a)(42), 8 U.S.C. § 1101(a)(42)(A):

> The term "refugee" means (A) any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .

INA § 208(a)(1), 8 U.S.C. § 1158(a)(1):

> Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .) irrespective of such alien's status, may apply for asylum in accordance with this section

INA § 241(b)(3)(A) (formerly § 243(h)):

> Notwithstanding paragraphs 1 and 2, the Attorney general may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a social group, or political opinion.

STATEMENT OF THE CASE

The following facts are material to consideration of the questions presented:[1]

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[1] The basis for federal jurisdiction in the United States Court of Appeals is 8 U.S.C. § 1105a(a) (1994), section 309(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, as amended by Pub. L. No. 104-302, 110 Stat. 3656 (1996) (IIRAIRA).

Petitioner is a French national, married to a lawful permanent resident alien, and has two United States citizen children. He is a fourth generation healer in the Celtic Catholic Church. On December 28, 1990, he appeared as an invited guest on a television show on the only independent channel in France to discuss faith-healing. He made "no mention of payment for his prayer services and he did not provide an address or phone number for people to contact him." Memorandum Decision, *In Re Petition of France for the Extradition of Philippe Sauvage*, United States District Court for the Southern District of California, Cv. No. 92-4160, Feb. 10, 1993 ("Extradition Dec.") at 3.[2] "There is no evidence . . . that Sauvage was soliciting prayer healing business on the show." *Id.*[3]

According to the French, following the TV broadcast, "millions" of letters were received by the station seeking Petitioner's prayers. *Id.* A person who believed she was cured by Petitioner, Marie-Jose Peiffer, formed a group Ordalie Jugement de Dieu ("OJD"), to help select people for Petitioner to pray for, and to collect donations or payments for his services. *Id.* at 4. Those seeking Petitioner's services were required to sign an "Intercession

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[2] The Extradition Decision is included in the administrative record in this case.

[3] Petitioner's counsel has recently obtained a copy of the television show in question, and caused a transcript to be prepared and submitted this to the Board with his Motion to Reopen. A review of the videotape indicates that at no time did Petitioner or anyone acting on his behalf solicit funds or clients on the show.

Protocol," explaining what the patients could expect from Petitioner.[4]

After some people complained that they had sought Petitioner's services, and made payments to OJD, but were not cured, the police raided OJD's and Petitioner's offices, seized all files and records, and sent a form inquiry to every person identified through Petitioner's and OJD's files to determine their desire to file a "complaint" in order to get their money back. Extradition Dec. at 5. The French authorities compiled a list of 200 people who allegedly responded to the form letter inquiry and agreed to file civil complaints against Petitioner or OJD. *Id.* These complainants allegedly informed French authorities that they were told by OJD agents (not Petitioner) that some of the funds collected would go to charitable organizations. The extradition Court concluded that funds collected by ODJ were in fact "donated to various charitable causes . . . " *Id.* at 6.[5] The District Court concluded "[t]here is no evidence

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[4] The "Intercession Protocol", which is part of the record in this case, clearly explains that no physical or other results were guaranteed, that patients should *not* stop their medical course of treatment. It discussed the exclusively "spiritualist" nature of the intervention, and stated that Petitioner's task consisted "exclusively in praying for the Soul salvation . . . He is . . . instead [a]pplying for the mercy of the Lord who solely could relieve the ordeals" of the people seeking his help. Petitioner testified at his deportation hearing that he was praying for people, not interfering with or discouraging any medical treatment.

[5] The District Court also concluded that Petitioner hardly benefited from the funds received by ODJ for his prayer services. He was provided "subsistence from OJD" while he was in Greenland planning for the opening of what he called an "archeotherapy center" which would work on faith-healing. *Id.* at 6. "The money was used to continue [Petitioner's] holistic

by which the court could reasonably believe Sauvage guilty of [the] offense [of making false statements]. . . . " *Id.* at 8. The French also presented "no evidence" that Petitioner in any way swindled those he agreed to serve through prayer. *Id.* at 10.[6]

The District Court concluded that if Petitioner were to be charged in this country on the charges presented by the French, "the guarantees of free exercise of religion under the First Amendment to our Constitution *would be in serious jeopardy.*" *Id.* at 12 (emph. added). Such a charge in this country *would be recognized as a "peril to religious freedom . . . " Id.* 12 (emph. added).

A newly acquired French court document dated October 12, 1995, some six months *after* the administrative record in this case closed, shows that Petitioner was convicted in France *in abstentia,* and sentenced to serve five years in prison.[7] It appears the final charge against

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healing ministry and also to support various environmental causes." IJ Decision at 8.

[6] The District Court concluded there was insufficient evidence to warrant even a finding that there is "reasonable or probable cause to believe the accused guilty" of any crimes. *Id.* at 11.

[7] Petitioner's new counsel's efforts to obtain this record of conviction and related French documents are described in a sworn declaration filed in the Court of Appeals with Petitioner's Motion to Stay. In short, the document could not be obtained through the French courts despite repeated and diligent efforts, however a non-certified copy was eventually fortuitously obtained through a co-defendant in the French case who happened to have a copy of the document in her possession. The French Record of Conviction was filed with the Court of Appeals, with a certified English translation, with Petitioner's Motion to Stay or for remand.

Philippe Sauvage was that his faith-healing involved illegally practicing medicine by *"personal action, verbal or written consultations or by any other procedure, whatever they are."* Record of Conviction at 10 (emph. added). Petitioner allegedly "persuad[ed] credulous people of the power of healers and the so-called hereditary, magical and divine healing powers of [Petitioner] through disguised and deceitful television advertising . . . " *Id.* at 10-11.[8]

The *only* reference in the entire document (and in the record in this case) to the use of television was *one* show on which Petitioner appeared as a guest, and, as explained above, during which he made "no mention of payment for his prayer services and he did not provide an address or phone number for people to contact him." Extradition Dec. at 3.

Regarding what Petitioner actually did to deserve being imprisoned for "fraud" for five years, the record of conviction states that he "most often practiced his art by [the] laying on of hands . . . *[H]e applied himself to make people know that no magnetism came out of him and that the healing took place out of the sick persons themselves on whose account he said he interceded with a power of a divine nature."*

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[8] The document of hearing of October 12, 1995 also indicates that the journalists on whose television show Petitioner briefly appeared for an interview were also criminally charged with being "accomplices of the crime of illegal practice of medicine by carrying out advertisement for [Petitioner] Philippe Sauvage . . . programmed intentionally in a day and time where many people were viewing." The French document of hearing also makes clear that the "good faith" of the four subjects who briefly appeared with Petitioner on the television show, and spoke of the healing they believed they experienced as a result of Petitioner's prayers, "is not in question . . . " *Id.* at 15.

Record of Conviction at 13 (emph. added).[9] There is no indication anywhere in the record of conviction that Petitioner intended to defraud anyone, that he does not believe in his faith-healing ability, or that those who consulted him relied upon any deceiving or false statements he ever made.

There is also no doubt, as the Extradition Decision made clear, that Petitioner could never be charged or imprisoned in this country or any other country observing religious freedom with the "crimes" he was convicted of in France. The section under which he was convicted, French Crim. Code Article 405, criminalizes, *inter alia*, acting to "persuade others of the existence of . . . an imaginary power . . . or to raise up hopes or fears of success" in exchange for payment of any sort, including "funds, furniture, bonds, notes, agreements, [or] receipts . . . " Extradition Dec. at 9.[10]

The French document of hearing finally pronounces "a sentence of imprisonment [against Petitioner] *without the possibility of a suspended sentence* . . . " Record of Conviction at 26 (emph. added). The French court

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[9] Further, he "entertained among sick people the belief in the reality of his personal gift . . . while enjoying with his sick people the prestige of a man with exceptional powers." *Id.* He "defines himself . . . as the holder of a gift . . . " *Id.* at 14.

[10] In short, the charges against Petitioner were made solely because "he said he was a faith healer, OJD accepted money for Sauvage's faith-healing services, [and some of] the afflicted were not cured." Extradition Dec. at 18.

sentenced Petitioner to "five years in prison and to pay a fine of one million francs." *Id.* at 36.[11]

Prior to any charges being made in his case, Petitioner traveled to Greenland to work with Eskimo Inuit.[12] Afraid of being removed to France for "criminal" proceedings regarding his faith-healing ministry, Petitioner traveled to Canada for a year where he lived and worked with Indian Mohawks, and then entered the United States with an altered passport, as many fleeing religious and other forms of persecution have in the past. IJ Decision, Appendix ("App.") p. 38.

On August 11, 1994, after the U.S. courts had denied extradition, deportation proceedings were commenced against Petitioner. Petitioner conceded having entered the United States using an altered passport. IJ Decision, App. p. 32.[13] He sought relief from deportation through political asylum, withholding of deportation, and eventually adjustment of status based upon an approved visa petition filed by his lawful permanent resident wife.

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[11] It appears that all other co-defendants were given suspended sentences, other than the two television hosts, against whom charges were eventually dropped. *Id.* at 35-36.

[12] Petitioner was charged in France while he was in Greenland. Extradition Decision at 4, between May and October, 1991. Deport Hrg. Tr. 8-11-94, p. 82.

[13] Petitioner admitted that he entered the United States with an altered passport because he believed his "life was threatened" if he returned to France. Tr. 12-22-94, p. 109:4. Petitioner testified that "he regrets having used deceptive tactics to come to this country," but that "he did so only because he fears persecution in France." *Id.* The IJ concluded that Petitioner "struck me as a sincere witness and I do not believe he entered this country in order to present a bogus asylum request." IJ Dec. at 29.

In a decision rendered on March 3, 1995, the IJ denied asylum and withholding because the Petitioner "failed to demonstrate that the French Government has ever taken any action against him, or contemplates any action against him, because of his race, religion, political opinion, nationality or membership in a social group." IJ Decision, App. p. 46.

Petitioner was living with Kuka Rosing Sauvage, his lawful permanent resident wife since well before the deportation proceedings commenced in this case. Deport. Tr. 8-11-94 at 39-40. They were married on August 30, 1994, shortly after the deportation proceedings commenced. The IJ opined that "an easy way" to resolve this case would be for Petitioner's wife to file an immigrant visa petition on behalf of Petitioner, and for Petitioner to file an application for adjustment of status and a motion to reopen once a visa petition was approved. Deport. Tr. 8-11-94 pp. 64-69.

Petitioner timely appealed the denial of asylum and withholding to the Board. At the time, Petitioner's former counsel had not discovered the existence or obtained a copy of the French record of conviction. On July 1, 1997, after the INS approved a visa petition filed on behalf of Petitioner by his wife, Petitioner filed with the Board a Motion to Remand in Order to Apply for Adjustment of Status under INA § 245, 8 U.S.C. § 1255. On September 22, 1997, the Board dismissed Petitioner's appeal and denied his motion to remand. Board Decision I, App. pp. 22-29.[14] The Board rejected Petitioner's asylum and

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[14] The motion to remand was denied because Petitioner's prior counsel failed to include an application for a waiver of excludability (in light of Petitioner's entry with an altered

withholding claims, concluding that he faced the potential of generally applied prosecution, not persecution. Board Decision I, App. pp. 26-28.[15]

On December 16, 1997, Petitioner through former counsel filed a second Motion to Reopen, this time accompanied by the appropriate application for a waiver of inadmissibility under INA § 212(i), and a sworn declaration executed by Petitioner's wife regarding the extreme hardship requirement. This motion was denied by the Board on June 15, 1998. Board Decision II, App. pp. 10-20.[16]

Petitioner appealed the Board's two decisions denying relief to the Ninth Circuit Court of Appeals, which affirmed its decision dated October 21, 1999. App. pp. 3-9. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed. After the Petition for Rehearing was filed, Petitioner's new counsel learned

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passport), nor did it present any of the required documentation to show that Petitioner's spouse or U.S. citizen children met the extreme hardship requirement for the waiver. Board Decision I at 4; App. p. 25.

[15] However, at the time of its decision the Board only considered "potential" charges against Petitioner, and had no knowledge that Petitioner had been tried *in abstentia*, convicted, and sentenced to serve five years in prison for religious conduct fully protected by domestic and international law.

[16] This time the Board found that Petitioner's wife's declaration – the only evidence of hardship submitted – had no "significant probative value" because its form failed to comply with 28 U.S.C. § 1746. The declaration was sworn to under penalty of perjury, but failed to state that it was "true." Former counsel, not Petitioner, was charged with knowledge of the proper form in which to submit declarations to be afforded probative value in the making of an important determination by the Board.

about and obtained a copy of the French conviction and five year prison sentence. Explaining that Petitioner remained unable to secure a certified copy of the record of conviction, or other pertinent documents, from the French court, Petitioner filed a motion for a temporary stay while he attempted to obtain the French criminal records, or, in the alternative, requested that the case be remanded for the Board to consider the conviction and five-year prison sentence. The Petition for Rehearing and motion for stay or remand were denied by Order dated March 3, 2000. App. 1. The mandate issued a few days later.[17]

In opposing Petitioner's motion to the Court of Appeals for a stay or remand, the INS argued that the Court of Appeals could not consider new evidence (i.e. the French record of conviction), and that Petitioner's remedy was to seek reopening before the Board.[18] However, upon the recent filing a motion to reopen with the Board, the INS opposed the motion arguing that Petitioner's time to file such a motion had expired. The Board has issued no decision. As the mandate of the Court of

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[17] However, Petitioner's present counsel was inadvertently not informed by the Court of Appeals of the decision denying the Motion for Rehearing until April 27, 2000, as the decision was mailed only to Petitioner's prior counsel.

[18] *See* Petitioner [INS'] Opposition to Petitioner's Motion to Stay Consideration of Petitioner's Petition for Rehearing, Feb. 17, 2000, at 2-3 ("it should be noted that an entirely separate mechanism does exist permitting the presentation of new facts in immigration cases. That mechanism is the motion to reopen before the BIA").

Appeals has issued, Petitioner has been ordered to appear for deportation on June 6, 2000.[19]

ARGUMENT

An analysis of appellate precedent shows that the *in abstentia* "criminal" conviction against Petitioner, along with an imposed sentence of five years of imprisonment, involve religious-based persecution, not prosecution for a "crime" of general application punishable in modern constitutional democracies which recognize the fundamental nature of religious freedom.

As the Court of Appeals noted, the "heart" of Petitioner's asylum claim "is his pending criminal prosecution in France . . . " Memorandum (Oct. 21, 1999) ("Memo"), App. p. 6. The Court of Appeals succinctly summarized the charges Petitioner faces in France: "France [seeks] to prosecute [Petitioner] for [1] holding himself out as a 'faith healer' and [2] soliciting funds for his services." Memo., App. p. 6.[20] As discussed below, if this is what France's charges are all about, they place Petitioner's freedom of religion in peril, and do amount to persecution under a qualifying basis for asylum and withholding of deportation.

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[19] Petitioner is therefore contemporaneously herewith seeking an emergency stay of deportation from the Board, and recall of the mandate before the Court of Appeals.

[20] The "criminal" charge was brought against Petitioner solely because "he said he was a faith healer, OJD accepted money for Sauvage's faith-healing services, [and some of] the afflicted were not cured." Extradition Dec. at 18.

A. Applicable law on asylum and withholding: "prosecution" versus "persecution"

INA § 208(a) provides that the Attorney General may, in her discretion, grant asylum to an alien who qualifies as a "refugee" within the meaning of Section 1101(a)(42)(A) of the statute. 8 U.S.C. § 1158(a) (1988 & Supp. 1992). The term refugee includes those who are unable or unwilling to return to their country of nationality "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). The INA also provides, in § 243(h)(1), that the Attorney General must withhold deportation to a country if the alien's "freedom would be threatened in such country on account of [his] . . . religion . . . " 8 U.S.C. § 1253(h).[21]

This petition asks the Court to decide whether the term "persecution" under the INA may include the "prosecution" that Petitioner faces upon return to France and, if so, whether that persecution is "on account of" Petitioner's religious activities.[22] The Court may also consider whether Petitioner Sauvage has demonstrated a

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[21] In order to be eligible for a discretionary grant of asylum under § 208(a), an alien need only show a "well-founded fear of persecution," but on the other hand, in order to establish entitlement to withholding of deportation under Section 243(h)(1), an alien must show "a clear probability" of a threat to life or freedom. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 428, 94 L. Ed. 2d 434, 107 S. Ct. 1207 (1987); *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).

[22] Section 243(h) does not use the term "persecution," instead it requires a "clear probability of a threat to life or freedom" on account of one of the enumerated factors. We understand the BIA holds that prosecution under generally

"clear probability" of a threat to his "freedom" so as to qualify for withholding of deportation and, in addition, whether he possibly has a "well-founded" fear of persecution so as qualify for a discretionary grant of asylum by the Attorney General.

As a general matter, however, the Board has held that fear of prosecution for violations of *fairly administered laws* does not itself qualify one as a "refugee" or make one eligible for withholding of deportation. *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985).[23] Thus those who violate laws governing fraudulent passports, military conscription, the distribution of certain films and videos, and population control do not merit asylum based on their fear of punishment for the crime that they committed.[24]

However, contrary to the decision of the Court of Appeals, nothing in the controlling statutes or legislative history suggests that fear of prosecution under laws of

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applicable laws cannot qualify as "persecution" under Section 208(a) or as a "threat to freedom" on account of one of enumerated factors under Section 243(h). Consistent with the BIA's language, we use the term "persecution" to refer to the standard under both Sections 208(a) and 243(h).

[23] The refusal to equate fugitive status with eligibility for asylum prevents the United States from becoming a haven for "common criminals." *Kovac v. INS*, 407 F.2d 102, 104 (2d Cir. 1969).

[24] *See, e.g., M.A. v. INS*, 899 F.2d 304, 312 (4th Cir. 1990) (rejecting claim that penalties for evading laws of conscription constitute persecution); *Abedini*, 971 F.2d at 191 (holding that punishment for avoiding military conscription, use of false passport, or distributing Western films was not persecution); *Chen v. INS*, 95 F.3d 801, 806 (9th Cir. 1996) (violating population control laws and fear of possible punishment under those laws does not constitute persecution).

general applicability may never provide the basis for asylum or withholding of deportation. To the contrary, the statute provides protection for those who fear persecution or threats to freedom "on account of" a number of factors, including religion, without distinguishing between persecution disguised as "under law" and persecution not so disguised.[25]

The language of the statute makes no exceptions for "generally applied" laws; if the prosecution itself is based on one of the enumerated factors (*e.g.* religious activity), and if the punishment under that law is sufficiently harsh to constitute persecution, they may provide the basis for asylum or withholding of deportation even if the law is "generally" applicable. This reading of the statute is both faithful to the language of the statute and consistent with its legislative history.

In the 1980 Refugee Act, Congress amended the INA to include § 208(a), providing for discretionary grants of asylum to those who qualify as refugees. The Act also amended Section 243(h), making withholding of deportation mandatory if the alien demonstrates a clear probability of harm on account of one of the enumerated factors. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429, 94 L. Ed. 2d 434, 107 S. Ct. 1207 (1987). One of Congress's "primary purposes" in enacting the 1980 law was to harmonize United States law with the United Nations

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[25] As the Second Circuit cautioned, in a case concerning illegal departure from Yugoslavia, "the memory of Hitler's atrocities and of the legal system he corrupted to serve his purposes . . . are still too fresh for us to suppose that physical persecution may not bear the *nihil obstet*. of a 'recognized judicial system.' " *Sovich v. Esperdy*, 319 F.2d 21, 27 (2d Cir. 1963).

Protocol Relating to the Status of Refugees ("U.N. Protocol"), to which the United States became a party in 1968. U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577.[26] In interpreting the Protocol, the Board and the courts have been guided by the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status ("Handbook"), which provides significant guidance in construing the Protocol. *Cardoza-Fonseca*, 480 U.S. at 439 n.22; *Marincas v. Lewis*, 92 F.3d 195, 204 (3d Cir. 1996); *Osorio v. INS*, 18 F.3d 1017, 1027 (2d Cir. 1994).

The Handbook unequivocally provides that persecution is not the same as "punishment for a common law offense," Handbook p. 56, but it is equally clear that prosecution under some laws – *such as those that do not conform with accepted human rights standards* – can constitute persecution. *Id.* at p. 59.

Moreover, prosecution under the type of law at issue here, one which restricts fundamental religious beliefs and activities, has long been recognized by the courts, and by the Handbook, as providing a possible basis for a claim of persecution. As the Handbook makes clear, where there is reason to believe that a person, due to his religious activities is liable to severe penalties, his recognition as a refugee will be justified if it can be shown that his motives for leaving or remaining outside the country are related to the reasons enumerated in Article IA(2) of

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[26] Congress specifically sought to define "refugee" in accordance with the Protocol; the definition of refugee under the 1980 Act is thus almost identical to the definition in the Protocol. *Id.* at Art. 2; *See Cardoza-Fonseca*, 107 S. Ct. at 1215-1216 (reviewing legislative history).

the 1951 Convention. Handbook at p. 61. Thus, according to the Handbook, if the asylum-seeker's motives in leaving or refusing to return to his or her country were "related" to an enumerated ground such as freedom of religion, and the applicant faces a "severe penalt[y]" under the laws of the state, prosecution under those laws may indeed constitute persecution.[27]

Similarly, the Handbook provides that

> In determining whether a[n] . . . offender [facing prosecution] can be considered a refugee, regard should also be had to the following elements: personality of the applicant, his political [or religious] opinion, the motive behind the act, the nature of the act committed, the nature of the prosecution, and its motives; finally, also the nature of the law on which the prosecution is based. These elements may go to show that the person concerned has a fear of persecution and not merely a fear of prosecution and punishment – within the law – for an act committed by him.

Handbook p. 86. It is clearly not enough to conclude, as the Ninth Circuit did here, that a law applies "generally"

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[27] *See, e.g., Matter of Janus & Janek*, 12 I&N Dec. 866 (BIA 1968); *Sovich v. Esperdy*, 319 F.2d 21 (2d Cir. 1963); *Coriolan v. INS*, 559 F.2d 993, 1000 (5th Cir. 1977). *Matter of Janus and Janek* involved brothers who claimed asylum based on their fear of punishment under Hungarian law for overstaying their visits in the United States and for seeking asylum. The BIA reasoned that "it cannot be said, across the board, that every statute imposing criminal sanctions for unauthorized travel outside of a particular country must be devoid of political implications." The BIA concluded that the brothers faced not "punishment for violation of an ordinary criminal statute" but instead "persecution for the political offenses" committed against Hungary. 12 I&N Dec. at 875.

and therefore prosecution under that law cannot support a claim for asylum or withholding of deportation. *Bastanipour v. INS*, 980 F.2d 1129 (7th Cir. 1992).

B. Persecution "on account of Religion"

We now address whether the persecution that Petitioner Sauvage claims he faces is "on account of religion" and therefore comes within the purview of the INA. As discussed above, the general applicability of France's law, without more, does not answer this question.[28] After our review of the conduct that France seeks to compel, of Sauvage's reasons for "violating" the rules, and of the nature of the rules in question, it is clear that France's motives in enforcing its rules against Sauvage are based on Sauvage's religious faith-healing activity.

The evidence permits no other conclusion than that Petitioner's alleged violation of France's laws was motivated by his "religion," which includes faith-healing. Petitioner engaged in his religious activity because he wished to exercise his religious faith and beliefs. When he appeared on television he did not solicit, nor did he even provide an address or telephone number. The French court found that those who believed he had helped them through prayer and who appeared on the television show with him were sincere and honest. Record of Conviction,

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[28] The INS has never argued that under *INS v. Elias-Zacarias*, 502 U.S. 478, 117 L. Ed. 2d 38, 112 S. Ct. 812 (1992), Sauvage has not shown that France's punishment of him would be "on account of" his religious activity because France may be motivated by factors other than Sauvage's religious faith-healing activity in electing to prosecute him.

p. 15. Those who sought his help signed a detailed "Intercession Protocol" which made perfectly clear they should not stop their conventional medical treatment or expect material results from Sauvage's prayers. Extradition Decision at 4-5. It discussed the exclusively "spiritualist" nature of the intervention, and stated that Petitioner's task consisted "exclusively in praying for the Soul salvation . . . He is . . . [a]pplying for the mercy of the Lord who solely could relieve the ordeals" of the people seeking his help. *Id.*

None of the people seeking his prayers paid any funds to Sauvage. By all accounts he received a "subsistence" level of funds from the group which those seeking his help contacted, and which they paid. There is no evidence that Petitioner made any false statements to anyone, about anything, but simply that *the French Government considers praying for people who are sick, in return for a payment, as itself fraud and practicing medicine without a license.*

To characterize Petitioner's action and his motivation in taking it as anything other than religious, modifies the term "religion" as used in INA § 208 beyond recognition. Unlike those, for example, who violate population control laws because they want more children, *see Chen v. INS*, 95 F.3d 801, 805 (9th Cir. 1996), or those who violate exit control laws in search of economic opportunity, *see Si v. Slattery*, 864 F. Supp. 397, 406 (S.D.N.Y. 1994), Petitioner, himself a minister, engaged in wholly religious activity – prayer to heal the sick – fully protected by well-established international law and the First Amendment.[29] He

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[29] *See* Article 19 of the United Nations Declaration of Human Rights, the United Nations Declaration on the

did so just as thousands of ministers do throughout the United States and the world. Indeed, few ministers go wholly unpaid for their services anywhere in the world today. Petitioner engaged in the activity he did simply and plainly because it is part of his religion. The evidence compels a reasonable fact finder to conclude that Petitioner's activities for which he stands convicted *in absentia* are solely based on his religious work. No evidence appears in this record that Petitioner engaged in any fraud or practiced medicine without a license.

Courts of Appeals should also, of course, look beyond an asylum applicant's motives to those of the allegedly persecuting country's motives. *INS v. Elias-Zacarias*, 502 U.S. 478, 117 L. Ed. 2d 38, 112 S. Ct. 812 (1992), requires that France's enforcement of its laws be "on account of" Petitioner's religious activity in order for Petitioner to qualify for relief.[30] This Court held in *Elias-Zacarias* that persecution for failing to join a guerrilla movement was not, on its face, "on account of" the applicant's political opinion. Instead the guerillas sought to fill their ranks and retaliated against those who refused to fight based on their refusal to fight, not based on their

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Elimination of All Forms of Intolerance and of Discrimination on Religion or Belief, Article 18 of the International Covenant on Civil and Political Rights ("ICCPR"), and Article 9 of the European Convention on Human Rights, *all of which guarantee and protect the fundamental right of freedom of religion.*

[30] Indeed, an applicant for asylum must show not that the persecutor's motives for persecuting the applicant are "religious" in some general sense, but instead that the persecutor is motivated specifically by the religious activity of the asylum-seeker.

political opinion. The Court of Appeals should have considered the nature of the statute being enforced, and the actions that France sought to compel by that statute, both of which help determine the motives of the alleged persecutor. For example, enforcement of a statute aimed at the expressive conduct of religious dissidents would constitute persecution based on "religion," but the enforcement of rules governing conscription does not necessarily constitute persecution. This distinction is necessary to effectuate the language of the INA – otherwise, breaking *any* "law", no matter how directly that law was aimed at religion or political opinion, would permit the state to say that it was punishing the conduct of breaking the law, not the religion or political opinion that led to that conduct.[31] *See Perkovic v. INS*, 33 F.3d 615, 622 (6th Cir. 1994) (holding that punishment under laws against peaceful political expression is "on account of" political opinion); *Bastanipour v. INS*, 980 F.2d 1129, 1132 (7th Cir. 1992) (reaching the unassailable conclusion that prosecution under law against apostasy is "on account of" religion).

In this context, it is clear that France's enforcement of its rules governing Petitioner's religious activity – including his faith-healing work – would be "relig[ious]." The French conviction resulted in a five-year prison sentence for activity everyone appears to agree would be wholly

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[31] One could virtually always argue that prosecution under laws prohibiting religious activities or political dissent is not "on account of" religion or political opinion because the persecutor is concerned with the action, not the belief or opinion that motivates it. (*i.e.*, "we prosecute him because he says things critical of the government, but we do not care if he actually holds this opinion."). *Elias-Zacarias* does not require this result.

protected religious expression in this country and under well-established international norms. A state which severely punishes certain minority religious faith-healing activity – even when the person charged and convicted did not intend to defraud anyone and fully believed in his religious beliefs – views such activity as a threat to the safety and security of society and therefore seeks to punish it. Thus the motive that an applicant must show on the part of the state is initially established on the face of a conviction that criminalizes wholly religious activity – untainted by any intent to defraud – which would be fully protected in this country.

The nature of France's law makes clear the importance of scrutinizing the conviction pursuant to which the applicant claims prosecution is likely. Numerous articles and reports have pointed out France's recent efforts to discriminate against numerous unfavored minority religions.[32]

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[32] Numerous recent reports shed light on the level of religious tolerance in France:

(i) International Helsinki Federation for Human Rights, Vienna, Austria, Annual Report 1999, France, Religious Tolerance: "Since 1996, increasing intolerance and discrimination against 'new religions' have been observed in France . . . A manifold pattern of virtual persecution has developed. Minority religions have been publicly marginalized and stigmatized, and there have been attempts to hinder their activities . . . France's "open confrontation" with minority religions "has led to slanderous reports in the media, to professional prohibitions, to religious discrimination by the French authorities and to increasing intolerance from civil society towards . . . people on the grounds of their personal religious beliefs."

(ii) U.S. Department of State, Annual Report on International Religious Freedom for 1999: France: The French Government took some actions during the period covered by this report "that

Moreover, even if the Court were to determine that the law itself does not establish the requisite motive, it should nonetheless conclude that the state's motive is, at least in part, religious. The record reveals that Petitioner is well-known in France as a religious faith healer. When France sought to charge and later convicted Petitioner, and sentenced him to serve five years in prison, France's enforcement of its "criminal" laws against him is at least in part "on account of" Petitioner's religious activity. To argue that Petitioner is prosecuted merely for "breaking the law" and not on "religious" grounds is to turn a blind eye to the motives of the government. Those motives are, at least in part, to punish those, like Petitioner, who have

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targeted religious minorities . . . " The ensuing publicity "contributed to an atmosphere of intolerance and bias against minority religions." *Id.* p. 2 (emph. added). During the past year the U.S. Embassy in France has "engaged actively on the issue of religious freedom" in France. *Id.* p. 6. Meetings on the issue have taken place at the highest levels of Government. *Id.* Reportedly, even the "President, [and] the Secretary of State . . . also have discussed religious freedom issues" with officials of the French Government. *Id.* During these meetings the U.S. Government has "rais[ed] concerns about some French official statement and policies . . . [that] are not, in accord with international agreements on religious freedom." *Id.*

(iii) M. Lionel Jospin, International Herald Tribune (3/23/00), Open Letter to the Prime Minister of France (expert international panel on freedom of religion in France): The current law "rejuvenates and expands a 1936 law authored by the infamous Pierre Laval, who became the Vichy government's leader under the Nazis and was executed as a collaborator in 1945." *Id.* p. 1. The "real target" of the law "is religions whose beliefs and practices the government disagrees with . . . " *Id.* While other European countries have engaged in dialogue with minority faiths, the French government "has chosen to persecute them." *Id.*

manifested an unwillingness to cease their religious activity regardless of the opposition thereto of the French Government.[33]

The Court of Appeals simply seems to conclude that France may have been motivated by legitimate concerns of protecting its citizens from fraud and the unlicensed practice of medicine. Memo. at 5; App. p. 6. Even if this concern motivated the French government in part, it certainly appears that France was also motivated by Petitioner's religious activity of faith-healing. *Osorio v. INS*, 18 F.3d 1017, 1028 (2d Cir. 1994) (finding that the plain meaning of the phrase "persecution on account of the victim's political opinion" does not mean persecution solely on account of the victim's political opinion). This conclusion is based on the conviction itself, which provides harsh punishment for the mere practice of faith-healing without evidence of fraud or practicing medicine without a license on the part of Petitioner, and on Petitioner's religious motivation in breaking France's laws.[34]

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[33] This conclusion does not suggest that all French nationals who engage in faith-healing activities are eligible for asylum. Petitioner's fear of persecution upon return is not based simply on his faith-healing activity, it is based on the conviction he has suffered and five-year prison sentence for engaging in religious activity which involved no intent to defraud.

[34] *See Matter of Janus and Janek*, 12 I&N Dec. 866, 874 (1968) (considering Janus' standing in the Communist party, his obligation to propagandize for the Czech government, the severity of punishment that he faced, and the government's concern with defection, and concluding that Janus faced not punishment for violating an ordinary criminal statute, but persecution for the political offense he has committed against the state).

C. The "well-founded" fear of persecution and the "clear probability of persecution" standards

Petitioner must demonstrate that his fear of persecution is "well-founded" in order to qualify for a discretionary grant of asylum under INA § 208(a). He must show that he faces a clear probability of harm to qualify for mandatory withholding of deportation under § 243(h) of the Act. *Elias-Zacarias*, 502 U.S. at 481. Under the "clear probability" of persecution standard of § 243(h), the Attorney General must withhold deportation if Petitioner demonstrates that upon deportation to France his "freedom would be threatened" on account of one of the statutory factors. 8 U.S.C. § 1253(h)(1); *Fatin*, 12 F.3d at 1237.[35]

In evaluating the likelihood that Petitioner faces persecution upon return to France, we begin with the fact that he has already been convicted *in abstentia*, and

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[35] To meet this standard, Petitioner must provide evidence that it is "more likely than not" he will face persecution if he is deported to France. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987). The test under § 208(a) is less exacting; Petitioner need only show that he has a subjective fear of persecution that is supported by objective evidence that *persecution is a reasonable possibility*. *See Cardoza-Fonseca*, 480 U.S. at 430, 440; *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987) (holding that "an applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution"). Fear can be well-founded even "when there is a less than 50% chance of the occurrence taking place." *Cardoza-Fonseca*, 480 U.S. at 431. If Petitioner meets this standard, the Attorney General may, but is not required to, grant asylum.

sentenced to serve five years in a prison.[36] We also consider that his conviction by all appearances violates Article 19 of the United Nations Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination on Religion or Belief, Article 18 of the International Covenant on Civil and Political Rights ("ICCPR"), and Article 9 of the European Convention, all of which guarantee and protect the fundamental right of freedom of religion.[37]

Under these circumstances, a trial *in abstentia* and five year prison term should be considered severe enough to constitute extreme harm, and therefore to constitute persecution. *See Fatin v. INS*, 12 F.3d 1233, 1240 (reasoning

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[36] While Petitioner made no false representations to anyone about anything, and did not solicit those who came to him for prayers, he faces a longer sentence than any of the co-defendants convicted with him.

[37] And, as already stated in a final judgment, if Petitioner was charged in this country on the same charges brought against him in France, "the guarantees of free exercise of religion under the First Amendment to our Constitution *would be in serious jeopardy*." Extradition Dec. at 12 (emph. added). Such a charge *would be recognized as a "peril to religious freedom . . . " Id.* (emph. added). As long as religious practitioners honestly believe in their faith, it violates their rights under the United States Constitution (and under the several binding international instruments mentioned above) to challenge and outlaw their "religious beliefs." Extradition Decision at 12; AR 939, *quoting United States v. Ballard*, 322 U.S. 78, 81-82 (1944). This is because "[f]reedom of thought, which includes freedom of religious belief, is basic in a society of free men." *Id.* at 13; AR 940, *quoting Ballard* at 86-87. People "may believe what they cannot prove." *Id.* A free people "[m]ay not be put to the proof [or criminally charged and jailed] for religious doctrines or beliefs." *Id.* If such charges could be made, *"little indeed would be left of religious freedom." Id.* (emph. added).

that the term persecution means extreme harm, but does not "encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional").[38]

Petitioner's claim is supported in part by the U.S. Department of State's Annual Report on International Religious Freedom for 1999 in France, which points out that the French Government "targeted religious minorities" during this period. Congressman Christopher Smith, Chairman of the Commission on Security and Cooperation in Europe, recently pointed to the "very dangerous trend" in France and other countries to "disenfranchise certain [minority religious] groups," using "a myriad of . . . tools [that] are repressive measures against peop'e [who] are blackballed and put outside the circle of what someone might construe to be acceptable." *Religious Freedom in Western Europe: Religious Minorities and Growing Government Intolerance*, Hearing before the Commission on Security and Cooperation in Europe, June 8, 1999, p. 3.[39] He concluded:

> What do you think is at the root of this increasing [in]tolerance, which puts people on the outside and using, *especially in a place like France, all of the tools at the government's disposal, including the tax laws and other laws to make life miserable, if*

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[38] Although "generally harsh conditions shared by many other persons" do not constitute "persecution," *id.* (*quoting In Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985)), the term does include confinement or other restrictions (including economic restrictions) so severe that they constitute a real threat to freedom. *Fatin*, 12 F.3d at 1240.

[39] Congressman Smith stated that "it is time that this is put at the top of the human rights concerns and not be treated as a sovereignty issue that ought to be handled by the French . . . on their own." *Id.* p. 4.

> *not impossible, for groups that the government does not want to exist?*

Id. (emph. added).

Punishment of five years of imprisonment and the prohibition of engaging in such religious activity in the future are sufficiently severe to constitute "persecution" under any standard. *See Matter of Janus & Janek*, 12 I&N at 875 (holding a year long sentence enough to constitute persecution for leaving Hungary).[40]

We now turn to a related inquiry – the likelihood that Petitioner will experience this persecution if he is returned to France. Considering France's charges and conviction of Petitioner, it is reasonable to conclude that Petitioner faces a better than even likelihood that he will experience a significant term of imprisonment that constitutes persecution if he is returned to France. Petitioner has thus made out a case of entitlement to withholding of deportation under 8 U.S.C. § 1253(h). He also appears to meet the less exacting requirements of § 1158(a), and is therefore eligible for a discretionary grant of asylum.

D. The Court of Appeals should have remanded for further proceedings and consideration of Petitioner's conviction and sentence

The Court of Appeals' refusal to remand this case to the Board for further consideration in light of Petitioner's conviction and five-year sentence may effectively leave

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[40] Even if it were true that France does not generally punish those who simply engage in religious activities, that conclusion has little to do with this case, where the purported violation of French laws has resulted in a trial in abstentia and a prison sentence of five years without the possibility of a suspended sentence.

him without the ability to have any body, administrative or judicial, consider these new facts. The Court of Appeals never explained its reasons for denying Petitioner's motion to stay or remand. However, while the INS opposed Petitioner's motion on the ground he could file motion to reopen before the Board, once he did so, the Service opposed reopening because of the "time and numerical limitation set forth in 8 C.F.R. Section 3.2 . . . " Service's Opposition to Motion to Reopen, p. 1. The Service pointed out that the Board had previously denied a motion to remand, and second, the motion was not filed within 90 days of the Board's deportation decision. *Id.* at 2. Under current law, Petitioner may have no right to appeal any decision of the Board denying reopening to any court. Thus, the Court of Appeals' denial of Petitioner's motion to remand may effectively leave him with no body to consider the recently acquired evidence of his conviction and lengthy prison sentence. Remand would have been proper not only to consider the impact of Petitioner's conviction and five-year sentence on his applications for asylum and withholding of deportation, but also on the Board's previous refusal to reopen for consideration of Petitioner's pending applications for adjustment of status and a waiver of inadmissibility, the focus of which is the "extreme hardship" his deportation would cause his lawful resident wife and United States citizen children. *See* Memo, App. pp. 8-9; Board Decision II, App. 15-19. When the Board denied reopening because the alleged hardship to Petitioner's wife and young children if Petitioner was deported to France was inadequate, it had no idea that the hardship included five years of separation because of a prison sentence already imposed by a French court. This new fact may well lead to a

different result if the case is remanded to the Board, possibly the only way the Board can even consider the conviction and sentence imposed following the close of the administrative record.

CONCLUSION

For the reasons stated above, Petitioner urges this Court to grant his petition for writ of certiorari.

Dated: June 1, 2000

Respectfully submitted,

LAW OFFICES OF PETER A. SCHEY
PETER A. SCHEY

Attorney for Respondent

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PHILIPPE SAUVAGE, Petitioner, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	)	CA Nos. 97-71189, 98-70781 I&NS No. A70-168-349 ORDER (Filed Mar. 3, 2000)

BEFORE: *CANBY and SILVERMAN, Circuit Judges, and SNYDER,[1] District Judge

Petitioner's motion to stay consideration of the petition for rehearing is DENIED.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judge Silverman has voted to deny the petition for rehearing en banc, and Judges Canby and Snyder have so recommended.

The petition for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

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[1] The Honorable Christina Snyder United States District Judge for the Central District of California, sitting by designation.

The petition for rehearing and the petition for rehearing en banc are denied.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PHILIPPE SAUVAGE, Petitioner, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.	)	CA Nos. 97-71189, 98-70781 I&NS No. A70-168-349 MEMORANDUM[1]

Petition to Review a Decision of the Immigration and Naturalization Service

Argued and Submitted September 17, 1999
San Francisco, California

BEFORE: CANBY and SILVERMAN, Circuit Judges, and SNYDER,[2] District Judge

Philippe Sauvage, a native and citizen of France, entered this country using a false French passport. An Immigration Judge and the Board of Immigration Appeals (BIA) have therefore found him deportable. *See* Immigration and Nationality Act (INA), §§ 241(a)(1)(A), 212(a)(6)(C)(i), 8 U.S.C. §§ 1251(a)(1)(A), 1182(a)(6)(C)(i)

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

[2] The Honorable Christina Snyder, United States District Judge for the Central District of California, sitting by designation.

(1994) (8 U.S.C. § 1251 now codified at 8 U.S.C. § 1227). In doing so, the BIA denied Sauvage's request for asylum and withholding of deportation. *See* INA §§ 208, 243(h), 8 U.S.C. §§ 1158, 1253(h) (1994). Sauvage petitions for review of this denial. In a separate appeal, here consolidated, Sauvage petitions for review of the BIA's subsequent denial of his motion to reopen his deportation proceedings so that he could apply for an adjustment of status and waiver of inadmissibility, INA §§ 245, 212(i), 8 U.S.C. §§ 1255, 1182(i). We have jurisdiction under 8 U.S.C. 1105a(a) (1994), section 309(c) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, as amended by Pub. L. No. 104-302, 110 Stat. 3656 (1996) (IIRIRA) and *Arrozal v. INS*, 159 F.3d 429, 431-32 (9th Cir. 1998). We affirm.

The parties are well acquainted with the facts; we do not discuss them further here. Both parties agree that Sauvage's petitions fall under IIRIRA's transitional rules.

1. Applications for Asylum and Withholding of Deportation.

We find that the BIA's denial of Sauvage's applications for asylum and deportation are supported by substantial evidence, and deny Sauvage's petition for review of these actions. This Court reviews for substantial evidence the BIA's determination that Sauvage is ineligible for asylum or withholding of deportation, reversing only if the record would compel a contrary conclusion. *See Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997). Sauvage bears the burden of establishing eligibility for asylum. *See*

Mejia-Paiz v. INS, 111 F.3d 720, 723 (9th Cir. 1997). He must show by "credible, direct, and specific evidence" an objectively reasonable basis for the claimed fear of persecution. *Prasad v. INS*, 47 F.3d 336, 338 (9th Cir. 1995) (internal quotations and citations omitted). The record in this case does not compel a finding that Sauvage faces persecution in France. Accordingly, we deny Sauvage's petition for review of the BIA's denial of his applications for asylum and withholding of deportation.

Sauvage argues that the BIA erred by (1) improperly discounting much of the documentary evidence he offered; and (2) failing to consider all of the evidence. We disagree.

First, we recognize that Sauvage presented a substantial amount of documentary evidence in support of his application. The BIA did not accord much weight to this evidence, however, because: (1) many documents were not properly translated; and (2) the "gratuitous language used in much of the documentation indicates a lack of objectivity on the part of the sources." Both conclusions are supported by the record. Sauvage concedes that many documents he provided were either not translated or improperly translated. He contends only that the BIA and the Immigration Judge failed to request proper translations for those documents. Sauvage misses the point. It is not incumbent upon the BIA to request that applicants comply with the regulations regarding the submission of evidence. In any event, Sauvage fails to respond effectively to the BIA's central concern: that documents prepared by and for the Breton nationalist movement were not objective or credible. As additional support for its

conclusion, the BIA points out that neither the Department of State opinion on Sauvage's application nor any reputable, independent human rights organizations have made findings similar to those suggested by these documents.

Second, Sauvage's claim of persecution lacks merit. The heart of Sauvage's asylum claim is his pending criminal prosecution in France for fraud and swindling. However, criminal prosecution does not, without more, establish persecution. *See, e.g., Abedini v. INS*, 971 F.2d 188, 191 (9th Cir. 1992). Sauvage maintains that his prosecution is an act of persecution on account of his religious and political beliefs. The district court's refusal to extradite Sauvage does not support his argument. *See In re Petition of France for the Extradition of Philippe Sauvage*, No. 92-4160M (S.D. Cal. Feb. 10, 1993) (mem. decision). France sought to prosecute Sauvage for holding himself out as a "faith healer" and soliciting funds for his services. The district court concluded that the French government provided insufficient evidence to establish that Sauvage was guilty of fraud. Specifically, the district court found that France had not provided any evidence to indicate that Sauvage did not honestly believe that he has the power to heal; and that absent this evidence, dual criminality and probable cause were lacking. *See id.*

The BIA concluded that Sauvage failed to establish that the prosecution was motivated by one of the grounds protected in the INA; the record does not compel a contrary finding. Sauvage has not been charged with a "political offense." Indeed, he had never been arrested prior to this incident. Furthermore, this arrest took place only after many official complaints of fraud were lodged

against Sauvage by former followers who were not healed despite sizeable contributions. In short, the record supports the BIA's finding that this was a bona fide prosecution. Therefore, the BIA's conclusion that the prosecution was not motivated by a protected ground is supported by substantial evidence.

2. Motion to Reopen

Under the IIRIRA's transitional rules, unless an exception applies, this Court has jurisdiction to hear Sauvage's appeal from the BIA's denial to reopen. *See* IIRIRA § 309(c)(1). We find that such an exception does not apply. It is true that section 309(c)(4)(E) of the transitional rules precludes an appeal of certain discretionary decisions of the BIA. *See* IIRIRA § 309(c)(4)(E) ("no appeal of any discretionary decision under section 212(c), 212(h), 212(i), 244, or 245 [of the INA]"). But this Court retains jurisdiction over the BIA's denial of Sauvage's motion to reopen because the BIA's discretionary action in denying Sauvage's motion to reopen is "intertwined with the deportation order," and the transitional rules do not preclude our review of Sauvage's deportation order. *Arrozal v. INS*, 159 F.3d 429, 432 (9th Cir. 1998).

The INS contends that the BIA's rejection of Sauvage's motion to reopen is a discretionary decision under section 212(i) of the INA, and that under a "plain reading" of the transitional rules, the BIA's denial is subject to the jurisdictional bar of section 309(c)(4)(E) of the IIRIRA. In *Arrozal*, however, we rejected the proposition that the discretionary decision to deny a motion to reopen was

not reviewable by this court if that decision was "intertwined" with a deportation order over which we did retain jurisdiction. 159 F.3d at 432. The rule in *Arrozal* is applicable here.

Having concluded we have jurisdiction to reach the merits of the BIA's denial of Sauvage's motion to reopen, we review for abuse of discretion and find none. *See Watkins v. INS*, 63 F.3d 844, 847 (9th Cir. 1995). With respect to Sauvage's petition for a waiver of inadmissibility under section 212(i), the BIA did not abuse its discretion in finding that Sauvage failed to meet the statutory extreme hardship requirement. We are satisfied that the BIA "heard, considered, and decided" the relevant aspects of Sauvage's claim. *Villanueva-Franco v. INS*, 802 F.2d 327, 330 (9th Cir. 1986). In reaching this conclusion, we reject Sauvage's claims that the BIA failed to consider relevant evidence, including the fact that Sauvage and his wife, Kuka Sauvage, "have been married over five years and have two children together, [and] that this is a well-established relationship." The BIA, quoting *Mejia-Carrillo v. INS*, 656 F.2d 520, 522 (9th Cir. 1981), acknowledged that this potential separation represented " '[t]he most important single [hardship] factor.' " The BIA discounted the significance of this hardship, however, because Sauvage's marriage to Kuka arose after Sauvage conceded deportability in a written pleading. Moreover, the BIA reasonably concluded that Kuka Sauvage would not be "forced to remain" in the United States, and that any family separation occurring in Europe would result from Sauvage's criminal prosecution for fraud. We find no reason to disturb the BIA's decision.

Sauvage's claim for adjustment of status can be addressed more briefly. Sauvage challenges the BIA's denial of his motion to remand proceedings to permit him to apply and be considered for an adjustment of status under section 245(i) of the INA. The BIA reasonably found Sauvage ineligible for an adjustment of status because he procured his admission into the United States through fraud or willful misrepresentation, a fact that Sauvage does not dispute. *See* INA §§ 245(i)(2)(A), 212(a)(6)(C)(i), 8 U.S.C. §§ 1255(i)(2)(A), 1182(a)(6)(C)(i).[3] We find no abuse of discretion.

The petition for review is

DENIED.

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[3] In addressing Sauvage's motion to reopen, the BIA found "another ground of inadmissibility that renders [Sauvage] ineligible for adjustment of status under section 245(i)(2)(A) of the Act." Specifically, the BIA found Sauvage had admitted that he committed the elements of the crime of bigamy. Because we find no abuse of discretion in the BIA's principal reason for refusing to adjust status, we need not reach the question of the requisite mens rea for bigamy under California law.

Decision of the Board of Immigration Appeals
U.S. Department of Justice

Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A70 168 349 – San Diego Date: JUN 15 1998

In re: PHILLIPE *SAUVAGE* a.k.a. Thierry Youf a.k.a. Philip Sauvage a.k.a. Fulup Gwezh a.k.a. Philippe Savage

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Kathrin S. Mautino, Esquire
444 West C Street, Suite 320
San Diego, California 92101

ON BEHALF OF SERVICE:
Alan S. Rabinowitz
Deputy District Counsel

CHARGE

Order: Sec. 241(a)(1)(A), I&N Act [8 U.S.C. § 1251(a)(1)(A)] – Excludable at entry under section 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] – Fraud or willful misrepresentation of material fact

APPLICATION: Reopening

By motion filed December 16, 1997, the respondent seeks to reopen proceedings so that he may apply for a

waiver of inadmissibility in conjunction with his application for adjustment of status. The Immigration and Naturalization Service opposes the motion. The motion will be denied.

I. BACKGROUND

This case was last before the Board on September 22, 1997, when we dismissed the respondent's appeal from the Immigration Judge's March 3, 1995, decision denying his application for asylum and withholding of deportation under sections 208 and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1253(h). We also denied the respondent's motion to remand proceedings for consideration of his application for adjustment of status under section 245(i) of the act, 8 U.S.C. § 1255(i), as the spouse of an alien granted lawful permanent resident status. Although the Service, in its statement of opposition to the motion to remand, raised a question as to the validity of the respondent's marriage, we based our denial on the respondent's inadmissibility under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having procured his admission into the United States through fraud or willful misrepresentation.

With his motion to reopen, the respondent has now submitted an application for a waiver of inadmissibility (Form I-601), and he specifically incorporates the arguments and materials relating to his prior motion to remand. In response, the Service has filed another statement of opposition incorporating its objections to the respondent's motion to remand and arguing that the respondent has failed to meet the extreme hardship

requirement of section 212(i) of the Act, 8 U.S.C. § 1182(i), as amended by section 349 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-639 ("IIRIRA").

II. GENERAL GROUNDS FOR DENIAL OF MOTIONS TO REOPEN

There are at least three grounds on which the board may deny motions to reopen. Failure to comply with the regulatory requirements which govern such motions can result in denial. In addition, a motion to reopen may be denied for failure to establish prima facie eligibility for the underlying relief being sought. *See, e.g., INS v. Abudu,* 485 U.S. 94 (1988). Finally, where the relief being sought is discretionary, the Board may deny reopening on discretionary grounds alone. *INS v. Doherty,* 502 U.S. 314 (1992); *INS v. Abudu, supra; Matter of Reves,* 18 I&N Dec. 249 (BIA 1982).

III. THE RESPONDENT'S CURRENT MARRIAGE IS VALID, BUT HE IS AN ADMITTED BIGAMIST

In this case, the question of the validity of the respondent's current marriage presents a complicated scenario that we will now address in view of the respondent's efforts to overcome the basis of our denial of his motion to remand. The following facts are not in dispute. The respondent married his first wife, Jocelyn Thomas, in 1975. This marriage occurred in France. On November 5, 1993, prior to his divorce from Ms. Thomas, the respondent married Sally Lee in California. On May 11, 1994, a

French court granted Ms. Thomas a judgment of divorce, apparently on grounds of abandonment and "associat[ion] with another woman." Subsequently, in July 1994, Ms. Lee filed a petition to nullify her marriage based on the respondent's preexisting marriage to Ms. Thomas, but no decree of annulment has been issued. The respondent's current marriage to Kuka Olsen, a native and citizen of Denmark, was contracted on August 30, 1994, also in California. On may 13, 1997, Ms. Olsen's nonimmigrant status was adjusted to that of a lawful permanent resident.[1] The respondent contends that he is entitled to an immigrant visa under section 203(d) of the Act, 8 U.S.C. § 1153(d).

We are satisfied that the respondent's marriage to Ms. Thomas has been legally dissolved. He has submitted evidence of the judgment of divorce and his birth certificate from Paris recording the divorce. Additionally, the respondent has supplied an extract from the Department of State's Foreign Affairs Manual stating that a birth certificate with such a notation is the document usually presented to prove a divorce.

However, in arguing that his marriage to Ms. Olsen is valid notwithstanding the absence of a decree of annulment for his marriage to Ms. Lee, the respondent admits that he committed the elements of the crime of bigamy. *See* Cal. Penal Code § 281(a) (West 1998). In California, no court adjudication is needed to establish the nullity of a marriage that is void from the beginning. *People v. Glab*,

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[1] We recognize that Ms. Olsen uses her married name, Kuka Sauvage, but for the sake of clarity, we shall continue to refer to her by her maiden name.

13 Cal. App. 2d 528 (1936). In his reply to the Service's statement of opposition to his motion to remand, the respondent supplied a copy of section 2201 of the California Family Code, which provides that bigamous and polygamous marriages are illegal and void from the beginning, unless:

> (a)(1) The former marriage has been dissolved or adjudged a nullity before the date of the subsequent marriage. (2) The former husband or wife (i) is absent, and not known to the person to be living for the period of five successive years immediately preceding the subsequent marriage, or (ii) is generally reputed or believed by the person to be dead at the time the subsequent marriage was contracted.
>
> (b) In either of the cases described in paragraph (2) of subdivision (a), the subsequent marriage is valid until its nullity is adjudged pursuant to subdivision (b) of Section 2210.

The respondent argues that neither of the cases described in section 2201(a)(2) applies to him, and thus, no decree of annulment is required. By taking this position, though, he admits that he married Ms. Lee knowing that his first wife, Ms. Thomas, was alive. Indeed, he could not credibly argue that he believed Ms. Thomas to be dead, since she translated much, if not all, of the foreign language documentation provided in support of his application for asylum and withholding of deportation.

Bigamy is a crime involving moral turpitude. *E.g., Gonzalez-Martinez v. Landon*, 203 F.2d 196 (9th Cir. 1953); *Matter of E-*, 2 I&N Dec. 328 (BIA, A.G. 1945). Therefore,

the respondent has disclosed another ground of inadmissibility that renders him ineligible for adjustment of status under section 245(i)(2)(A) of the Act. *See* section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I).[2]

IV. EXTREME HARDSHIP

Moreover, we agree with the Service that the respondent has failed to meet the extreme hardship requirement of section 212(i) of the Act.[3] The respondent's waiver application is supported by an unsworn declaration, dated December 11, 1997, purportedly by Ms. Olsen. This document is not of any significant probative value. Although it appears to have been initialed "under penalty of perjury," it has not been "subscribed . . . as true,"

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[2] We note that section 212(a)(2)(A)(ii)(II) of the Act provides for an exception where the maximum term of imprisonment is 1 year, but the California penalty provision for bigamy no longer specifies a maximum term of imprisonment in cases where the defendant is sent to state prison as opposed to county jail. Cal. Penal Code § 283 (West 1998).

[3] The respondent questions, but does not contest that the amended provision applies to his application. *See generally Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992) (explaining that an alien seeking to adjust his status to that of a lawful permanent resident is assimilated to the position of an applicant for entry into the United States). Under section 212(i) of the Act, only hardship to a United States citizen or lawful permanent resident spouse or parent is relevant. Section 212(h) of the Act, 8 U.S.C. § 1182(h), which waives the ground of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act, also includes an extreme hardship requirement where the alien's crime was committed less than 15 years before the date of the alien's application for a visa, admission, or adjustment of status.

and thus, does not have the "same force and effect" of a sworn declaration or affidavit. 28 U.S.C. § 1746.

Even assuming that this document qualifies as "evidentiary material" for purposes of 8 C.F.R. § 3.2(c)(1) (1997), we find that it does not establish a prima facie case of extreme hardship. In the declaration, Ms. Olsen asserts that the denial of the respondent's adjustment application would leave her with the difficult choice of remaining in the United States with her two United States citizen children[4] without the respondent or returning with the respondent to France, where he is wanted by the authorities on fraud-related charges. More specifically, she states that the respondent is her "spiritual support" and that if he were to return to France, or anywhere within the European Union, she would suffer from the "constant fear" that he would be "arrested, tortured or killed." She also anticipates that if she were to stay in the United States, the burden of caring for her children on her own would eventually compel her to give up her position in her religious order, which could lead to her use of welfare to support the family. If, on the other hand, she were to find a "more traditional occupation," she and her children may be forced to undergo the "extremely traumatic" experience of having the children cared for by a babysitter or in a day care center, which may affect their "spiritual growth."

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[4] No birth certificates have been presented for these children, though they are listed on the respondent's adjustment application and one, Kalaallaat, was claimed at the hearing before the Immigration Judge.

The Ninth Circuit Court of Appeals has stated that "[t]he most important single [hardship] factor may be the separation of the alien from family living in the United States." *Mejia-Carrillo v. INS*, 656 F.2d 520, 522 (9th Cir. 1981); *but see Sullivan v. INS*, 772 F.2d 609, 611 (9th Cir. 1985) ("Deportation rarely occurs without personal distress and emotional hurt."). However, in this case, it is apparent that Ms. Olsen married the respondent knowing that he was a fugitive who faced deportation back to France. We note in this regard that the respondent's deportability was conceded in a written pleading dated December 21, 1993 (I.J. at 2; Exh. 6), well before his marriage to Ms. Olsen. Thus, she should have been aware from the start of their marital relationship, if not before, that she faced the prospect of separation.[5] *See generally Israel v. INS*, 710 F.2d 601 (9th Cir. 1983) (finding that the Board acted properly in attaching little weight to hardship factors that arose after the aliens were found deportable).

As for Ms. Olsen's particular concerns regarding the welfare of her children, we note that no documentary evidence has been presented to show that suitable child care, and any other assistance she may need in getting her children to adjust to the respondent's absence and potential imprisonment in France, would be unavailable to her through her religious order or elsewhere in her community. *See generally Perez v. INS*, 96 F.3d 390 (9th Cir.

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[5] According to her declaration, Ms. Olsen was involved in the respondent's organization in France, Ordalie-Judgment of God (OJD), and was with the respondent in Greenland when French authorities brought charges against him.

1996) (discussing the evidentiary burden in proving extreme hardship based on family separation). On the contrary, she states in her declaration that her order is "very generous" in its support, and this generosity is, in turn, confirmed by the letter attached to the Affidavit of Support (Form I-134) that the organization executed on her behalf. Moreover, according to her declaration, the respondent intends to accept an offer of employment if his adjustment application is ultimately granted, which indicates that the use of child care services may be necessary in any event, as is common when both parents work.

We further note that, while Ms. Olsen asserts that she would be "forced to remain" in the United States with her children, it is apparent that this is not necessarily the case, because she also discusses the possibility of returning to Europe with the respondent. Of course, as she points out, the family may also be separated in Europe, but such separation would be caused by the pending criminal prosecution against the respondent. As we have already determined that the respondent's liability to criminal prosecution and punishment in France is not "persecution" within the meaning of the Act, we are wholly unpersuaded that Ms. Olsen would suffer any undue hardship on this account whether she remained in the United States or accompanied the respondent in the event of his departure. We recognize that her present religious order is headquartered in California, but Ms. Olsen's declaration indicates that she was involved in religious work prior to her arrival in the United States, and no evidence has been presented to show that she could not continue such work through her order or some

other organization if she were to depart with the respondent. In short, we accept that the respondent is legally the spouse of a lawful permanent resident of the United States, but we nevertheless conclude that he had presented insufficient evidence to establish prima facie eligibility for relief under section 212(i) of the act. *See generally Shooshtary v. INS*, 39 F.3d 1049 (9th Cir. 1994) (discussing the term "extreme hardship" within the context of an application for a waiver of inadmissibility); *Matter of Ngai*, 19 I&N Dec. 245 (Comm. 1984) (same); *see also Matter of Pilch*, Interim Decision 3298 (BIA 1995) (discussing the term "extreme hardship" within the context of an application for suspension of deportation).

V. DISCRETION

Alternatively, we deny the respondent's motion to reopen in the exercise of discretion. While the respondent may have a wife and two children in the United States, he accrued these equities after the commencement of deportation proceedings against him. *See Matter of Correa*, 19 I&N Dec. 130 (BIA 1984). The significance of his family ties in this country is further undermined by the fact that in 1991, he left his first wife of 16 years and their five children in France when he fled to Canada from Greenland upon learning that criminal charges had been brought against him.[6] In 1992, the respondent admittedly used a fraudulent passport to gain entry into the United

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[6] We emphasize that it is not within our province to determine the guilt or innocence of the respondent in respect to the charges pending against him in France. As we have denied the respondent's asylum claim, this is a matter entirely for the French courts to decide.

States on two separate occasions. He then committed the crime of bigamy while maintaining a relationship with his first wife, as evidenced by the active role Ms. Thomas took in helping the respondent apply for asylum in these proceedings. The record reflects that he also gave false testimony at his deportation hearing by stating under oath to the Immigration Judge that he was divorced from Ms. Thomas in 1992 (Tr. at 120-21). Under the circumstances, we do not consider the respondent desirable as a permanent resident of the United States. *See Matter of Mendez*, Interim Decision 3272 (BIA 1996); *see also Kim v. Meese*, 810 F.2d 1494, 1497 (9th Cir. 1987) ("Adjustment of status is an extraordinary remedy to be granted only in meritorious cases."). We therefore decline to exercise our discretion in his favor.

ORDER: The motion to reopen is denied.

/s/ Illegible
FOR THE BOARD

Decision of the Board of Immigration Appeals
U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A70 168 349-San Diego Date: JUN 15 1998
In re: PHILLIPE SAUVAGE a.k.a. Thierry Youf a.k.a. Philip Sauvage a.k.a. Fulup Gwezh a.k.a. Philippe Savage

CONCURRING OPINION: Gustavo D. Villageliu, Board Member

I respectfully concur.

I concur in the denial of the respondent's motion as a matter of discretion for the reasons stated in the majority decision, However, I disagree with the majority's substantive determination that *prima facie* extreme hardship was not established for purposes of section 212(i) relief. The substantive determination engaged in by the majority weighing the evidence of hardship presented for purposes of reopening is inappropriate at this stage. For purposes of reopening the test is *prima facie* evidence of extreme hardship. In my opinion, the forcible separation of a respondent from his United States citizen wife and two United States citizen children is always *prima facie* evidence of potential extreme hardship, absent evidence to the contrary, such as when a respondent's conduct clearly is a danger to his nuclear family.

/s/ Gustavo D. Villageliu
Gustavo D. Villageliu
Board Member

Decision of the Board of Immigration Appeals
U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: 170 168 349-San Diego Date: SEP 22 1997
In re: PHILLIPE SAUVAGE a.k.a. Thierry Youf a.k.a. Philip Sauvage a.k.a. Fulup Gwezh a.k.a. Philippe Savage

IN DEPORTATION PROCEEDINGS

APPEAL
ON BEHALF OF RESPONDENT:
Kathrin S. Mautino, Esquire
444 West C Street, Suite 320
San Diego, California 92101

ON BEHALF OF SERVICE:
Alan S. Rabinowitz
Deputy District Counsel

CHARGE:
Order: Sec. 241(a)(1)(A), I&N Act [8 U.S.C. § 1251(a)(1)(A)] – Excludable at entry under section 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] – Fraud or willful misrepresentation of material fact

APPLICATION: Asylum; withholding of deportation; remand

ORDER:

PER CURIAM. The appeal is dismissed. The motion to remand is denied.

In a decision dated March 3, 1995, the Immigration Judge found the respondent deportable as charged,

denied his application for asylum and withholding of deportation under sections 208 and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1253(h), but granted him the privilege of almost 6 months' voluntary departure pursuant to section 244(3) of the Act, 8 U.S.C. § 1254(e). The respondent appealed from the denial of asylum and withholding of deportation. Subsequent to the filing of his appeal, the respondent moved to remand proceedings so that he may apply and be considered for adjustment of status under section 245(i) of the Act, 8 U.S.C. § 1255(i), based on his marriage to an alien recently granted lawful permanent resident status. The Immigration and Naturalization Service opposes the motion.

The respondent is a 43-year-old ethnic Breton and citizen of France. He is also a faith healer who is wanted by French authorities on fraud-related charges.[1] The respondent claims, in essence that the French government is totalitarian and repressive in nature and that in bringing criminal charges against him, the authorities in fact seek to persecute him for his Breton nationalism and his

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[1] The record reflects that in 1992, the respondent was placed in extradition proceedings pursuant to an international arrest warrant. In a decision dated February 10, 1993, the United States District Court for the Southern District of California denied extradition for lack of probable cause and dual criminality. According to an advisory opinion from the Department of State, Office of Asylum Affairs, Bureau of Human Rights and Humanitarian Affairs (currently the Bureau of Democracy, Human Rights, and Labor), the French government has now withdrawn its request for extradition, but there is no evidence that the charges against the respondent have been dropped.

spiritualism. On appeal, he argues that the Immigration Judge erred in concluding otherwise. Having reviewed the record, however, we concur with the Immigration Judge's finding that the respondent has failed to establish a claim of persecution for purposes of the Act.

Neither the Immigration Judge nor this Board is required to refer to each and every piece of evidence presented by an asylum applicant. *See Ghaly v. INS*, 58 F.3d 1425 (9th Cir. 1995). In this case, to corroborate his claim, the respondent presented a voluminous amount of documentary evidence as well as the testimony of a witness, Frank Thorton. While the Immigration Judge made specific mention of some of the evidence in his decision, it is apparent that in general, he did not accord the evidence much weight in determining whether the respondent is subject to persecution or simply criminal prosecution. Based on our own examination of the evidence, we also consider it to be of questionable probative value as to the issue of persecution. In particular, we note that the respondent's foreign language documentation does not appear to have been properly translated. Many of the documents are unaccompanied by the translator's certification as required by the regulations at 8 C.F.R. § 3.33 (1996). Moreover, on most documents, including those that do have a certification of accuracy, the translator, who apparently is the respondent's first wife, added emphasis and/or explanatory notes, which suggests that the documents were in effect edited.

In any event, we find that the gratuitous language used in much of the documentation indicates a lack of objectivity on the part of the sources, which include other

Breton nationalists, what appear to be nationalist publications, and "a Human Rights Breton commission" (Item 14).[2] In addition, we note that Mr. Thorton's testimony was vague and highly conclusory in nature. He admittedly has not been to France since 1972, and while he claimed to be in contact with overseas "operatives" (Tr. at 99), he refused to provide more specific information as to his current knowledge of the French government's alleged manner of dealing with suspected "dissenters or terrorists" (Tr. at 96). Instead, he referred to the documentation he submitted, which includes a letter dated August 1, 1994, indicating that the respondent himself is one of Mr. Thorton's consultants and that the respondent and Mr. Thorton are also "partners in what hopefully will be a very profitable business venture" (Item 35).

If modern France were truly as repressive as alleged, with systemic human rights abuses against nationalists and separatists as opposed to isolated incidents of police brutality, this presumably would be verifiable through independent sources such as Amnesty International or Human Rights Watch.[3] *See Matter of S-M-J-*, Interim Decision 3303 (BIA 1997). The record instead includes excerpts from a published thesis and other books discussing the Breton movement and French centralism which do

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[2] The record also includes letters from various individuals which have not been notarized.

[3] We do not dispute that discrimination exists in France, particularly against dark-skinned people, but this does not generally support a claim for relief under section 208 or 243(h) of the Act. *See Fisher v. INS*, 79 F.3d 955 (9th Cir. 1995); *Ghaly v. INS, supra.*

not generally support the respondent's view of conditions in France. For instance, it is apparent from these sources that while the government certainly is in favor of preserving the unity of France, non-violent nationalist groups and organizations are allowed to function and to promote their views through the democratic process. The modern Breton movement, unlike that which ended with World War II, is also described as "almost entirely left-wing" (Item 5), which contradicts the respondent's claim. These sources further indicate that under Socialist President François Miterrand, the government even adopted a policy of de-centralization and, thus, students in state schools may now receive up to 3 hours of instruction in the Breton language per week.[4]

As the respondent concedes on appeal, his liability to criminal prosecution and punishment for suspected violations of the laws of his country does not, without more, constitute "persecution" within the meaning of the Act. *See, e.g., Abedini v. INS*, 971 F.2d 188 (9th Cir 1992); *Rodriguez-Rivera v. INS*, 848 F.2d 998 (9th Cir. 1988); *Matter of U-M-*, 20 I&N Dec. 683 (BIA 1993); *Matter of R-O-*, 20 I&N Dec. 455 (BIA 1992). We recognize that "prosecution for an offense may be a pretext for punishing an individual for his political opinion" or one of the other grounds protected under the Act. *Matter of S-P-*, Interim Decision

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[4] We note that at the beginning of the 1980s, a journal producing "a literature of hard-line linguistic militancy" already was able to claim about 1200 subscribers (Item 5). There apparently is also a Celtic Department at the University of Rennes, "where teachers and students . . . often espouse the ideas of *Skol an Emsav*," which is described as the "most hard-line proponent of the Breton language in the movement" (*id.*).

3287, at 9 (BIA 1996). However, the respondent before us has been a "Celtic spiritual leader and healer," and thus an "important symbol of the Breton national identity," since resigning from the police force in 1978. (Exh. 11-A);[5] yet, as he himself emphasized at the hearing, he has only ever been arrested in the United States.[6] He has not been charged with a political offense such as terrorism or advocating separatism. Indeed, the record indicates that the French authorities showed no interest in punishing him until after he appeared on a television program and started receiving large sums of money through his organization, Ordali-Judgment of God (OJD), from a particularly vulnerable segment of the population in exchange for his faith healing services, which were not always successful.[7] Moreover, by his own admission, his mother

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[5] The respondent claims that he had a 2-year option for rejoining the police force, which was revoked when the "Marxists took power" in 1981 (Tr. at 56). However, as his resignation was in 1978, it is apparent that his 2-year option had expired by 1981.

[6] The respondent apparently was in Greenland when the charges were brought against him, and rather than return to France to defend himself, he fled to Canada and then entered the United States with a fraudulent passport.

[7] The OJD apparently collected about 5 million francs. At the conclusion of his testimony, the respondent stated that between 1981 and 1991, "[t]hey" harassed him "[c]onstantly" by doing such things as breaking into his "offices" (Tr. at 134), but he previously admitted that he had no problems "officially" with the French government during this period (Tr. at 133). We further note this claim of harassment is unsupported by the respondent's own written statements. In fact, it is not even clear that the respondent had any "offices" until the OJD was established following his television appearance.

and grandmother, who are also faith healers, have been able to continue practicing their ministry "discreetly" (Tr. at 48). While the respondent attempted to distinguish his situation by claiming that he was an "outspoken opponent [of] the French Marxist government" (*id.*), for the reasons set forth above, we simply find no basis for concluding that there is a connection between his political beliefs and the charges against him.

In short, we are not persuaded that the respondent was persecuted or has a well-founded fear of persecution on account of any of the grounds protected under the Act. *See INS v. Elias-Zacarias*, 502 U.S. 478 (1992). Having thus failed to meet the lower statutory burden of proof required for asylum, it follows that the respondent has also failed to satisfy the clear probability standard of eligibility required withholding of deportation. *See INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

As for the respondent's motion to remand, we note that such motions must comply with the substantive requirements for a motion to reopen. *See Matter of Coelho*, 20 I&N Dec. 465 (BIA 1992). Thus, the Board may deny a motion to remand based upon an alien's failure to establish prima facie eligibility for the relief sought. *Id.* at 472. Moreover, the regulations at 8 C.F.R. § 3.2(c)(1)(1996) specify that motions "must be accompanied by the appropriate application for relief and all supporting documentation."

In its statement of opposition, the Service questions whether the respondent's prior marriages have been legally terminated. We consider it unnecessary to address

this issue, however, because the record reflects that the respondent is ineligible for adjustment of status for having procured his admission into the United States through fraud or willful misrepresentation in violation of section 212(a)(6)(C)(i) of the Act; 8 U.S.C. § 1182(a)(6)(C)(i). *See* section 245(i)(2)(A) of the Act. A waiver of this ground of inadmissibility is available under section 212(i) of the Act, 8 U.S.C. § 1182(i), *see* 8 C.F.R. §§ 242.17(a), 245.1(f) (1996), as was mentioned at the hearing, but the respondent has neither requested such relief nor presented documentation to show that he meets the extreme hardship requirement of the Act.[8]

Accordingly, the appeal is dismissed, and the motion to remand is denied.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and, in the event of failure so to depart,

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[8] As amended by section 349 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009, ___ (enacted Sept. 30, 1996) ("IIRIRA"), section 212(i) requires a showing of extreme hardship to the aliens's United States citizen or lawful permanent resident spouse or parent.

the respondent shall be deported as provided in the Immigration Judge's order.

/s/ Mary (illegible)
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Office of the Immigration Judge
San Diego, California

File: A70 168 349

In the Matter of Phillipe SAUVAGE aka Thierry YOUF aka Pulup GWEZH Respondent	)	IN DEPORTATION PROCEEDINGS

CHARGE: Section 241(a)(1)(A) I&N Act, as amended, 8 U.S.C. 1251(a)(1)(A) – deportable as excludable at entry – obtained entry by fraud of willful misrepresentation of material fact in violation of section 212(a)(6)(C)(i) I&N Act, as amended, 8 U.S.C. 1182(a)(6)(C)(i).

APPLICATION: Asylum and withholding of deportation; voluntary departure.

ON BEHALF OF THE RESPONDENT:	ON BEHALF OF THE SERVICE:
Kathrin S. Mautino, Esquire 444 West C St Ste 320 San Diego CA 92101	William C. Birkett, Esquire 880 Front St Ste 1234 San Diego CA 92101

WRITTEN DECISION OF THE IMMIGRATION JUDGE

The respondent herein is an adult male alien, 41 years of age and married, a native and citizen of France, of Celtic ethnic origin, who entered this country on a false passport on September 16, 1992. On February 12, 1993, the Immigration and Naturalization Service ("the

Service") issued an Order to Show Cause which was filed with my office on May 28, 1993, thus instituting deportation proceedings. *Exhibit 1.* In this document, the Service contends he is deportable on the charge set forth above.

The respondent and counsel appeared for Master Calendar hearing on December 31, 1993 and signed and filed a document captioned "Record of Master Calendar Appearance." *Exhibit 6.* This document is, *inter alia,* a written pleading to the Show Cause Order. In it, the respondent concedes as true all five factual allegations and admits as legally correct the charge of deportability. *Id.* This pleading was orally confirmed at Individual Calendar hearing on August 11, 1994. Relying upon these admissions, I find that evidence of his deportability is clear, convincing and unequivocal.

Although conceding deportability, the respondent hopes to remain in the United States as a refugee by qualifying for asylum: his application and supporting declaration are in evidence. *Exhibits 11, 11-A.* The asylum application in this hearing is considered a simultaneous request for the withholding of deportation remedy. *Matter of Portales,* 18 I&N Dec. 239 (BIA 1982); *Matter of Rodriguez-Palma,* 17 I&N Dec. 465 (BIA 1980). Although the asylum statute speaks in terms of persecution and the withholding statute refers to threats to life or freedom, the five grounds upon which a claim to asylum and withholding are based are identical. *Matter of Martinez-Romero,* 18 I&N Dec. 75 (BIA 1981). The two applications are adjudicated together in this proceeding. *Matter of Mogharrabi,* 19 I&N Dec. 439 (BIA 1987).

Under the laws of this country, an alien seeking asylum must initially present sufficient evidence to establish a *prima facie* case that he has a well-founded fear of being persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion if he is returned to his homeland. If the alien is also seeking withholding of deportation relief, he must show a clear probability of such persecution if he is returned. *Espinoza-Martinez v. INS*, 754 F.2d 1536, 1539 (CA9 1985). To meet these burdens of proof, it is recognized that he must show that he is an individual who will be singled out for persecution for one of these reasons. *Id.* at 1540. The asylum applicant must point to specific, objective facts that support an inference of past persecution or risk of future persecution. *Cardoza-Fonseca v. INS*, 767 F.2d 1448, 1453 (CA9 1985), *aff'd INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). These objective facts can be established through the credible and persuasive testimony of the asylum applicant himself, although mere assertions of possible fear are insufficient. *Id.* It is only after objective evidence sufficient to suggest a risk of persecution has been introduced that the applicant's subjective fears and desire to avoid the risk-laden situation in his native land become relevant. *Id.*

The asylum applicant has demonstrated a well-founded fear of persecution if he shows that a reasonable person in his circumstances would fear persecution. *Matter of Mogharrabi, supra.* This "reasonable person" standard of proof can include even a ten-per-cent chance of persecution. *Blanco-Comarribas v. INS*, 830 F.2d 1039 (CA9 1987). However, with regard to the burden of proof of the withholding statute, the clear probability standard means

a showing of a greater-than-fifty-per-cent chance of persecution, should the asylum applicant be returned to the home country. *Cardoza-Fonseca v. INS, supra.*

Turning first to the asylum application and supporting declaration (*Exhibits 11, 11-A*), the respondent asserts that he is a Celtic priest-healer who supports the ethnic rights of the Celtic people of the French province of Brittany. He claims that, because he is a Celtic Breton who opposes current French government policies, he is in danger of persecution from the government. The application points out that extradition proceedings were instituted by his government in 1992, but the request was denied in 1993. *Exhibit 11,* Page 3, Paragraph 22. His supporting statement claims that, because of his notoriety as a Celtic Breton who opposed the government, the authorities used his priest-healing activities as an excuse to accuse him of fraud, and this formed the facial reason for the government's attempt to extradite him. In reality, however, he believes the government wishes to persecute him because he believes in autonomy for Brittany and this is opposed by the central government of France.

The asylum application and large packet of supporting documents (*Exhibits 11, 11-A, 12*) were submitted to the asylum office of the Department of State for an advisory opinion, this as required by the regulation. *Exhibit 14.* The State Department, by letter dated June 2, 1994, opined the respondent's claim did not fit within the parameters of the asylum statute. *Exhibit 15.* The Department noted that the French government had withdrawn its request for extradition. Concerning the respondent's claim to possible religious persecution because he is a

priest-healer, the department pointed out that all religions are tolerated in France today. The Department believes that his status as priest-healer would not subject him to mistreatment. Furthermore, the Department opined that, unless his activities involved terrorism, support of Breton rights would not lead to persecution by the government. Although the State Department opinion is noted, I am required to make an independent finding on the merits of the asylum claim. *Matter of Matelot*, 18 I&N Dec. 334 (BIA 1982); *Matter of Exilius*, 18 I&N Dec. 276 (BIA 1982).

In addition to the wealth of written materials, the respondent testified at length regarding the basis of his asylum claim. The started by giving his view of French history and the history of Brittany. He pointed out that, at one time, Brittany was an independent region which was absorbed into France several hundred years ago. The inhabitants of Brittany are, for the most part, of Celtic origin. He believes that French history indicates a persecution of Celtic Bretons and he opined that there were thousands of Celtic Bretons slaughtered at the end of World War II by Communist members of the French Resistance who had fought the German occupation. He believes that this progom left the people of Britany in a state of shock and "historical trauma."

By 1960, the French Government found itself embroiled in an insurgency war in its African province of Algeria. The respondent asserted that the government took steps to centralize its power as it feared that Celtic Bretons would rise up against the central authority and thus create a "second fighting front." In order to deal

with anticipated unrest in Brittany, the government established a judicial entity known as the *Court de Surete de L' Etat,* which the respondent described as essentially a military court with an anti-terrorist mission. He believes this arm of the government was used to jail Cents who spoke out in favor of Breton autonomy. One prominent victim he mentioned was Yan Peilandra, who was jailed and "physically and psychologically tortured" because he dared to teach children to speak the Celtic language.

The respondent believes that Celtic nationalism is essentially non-violent in nature and does not advocate bloodshed. He concedes, however, that some nationalists have decided to use violent tactics but, in the main, the movement is pacifist in nature. He thinks, however, the French government has repeatedly used violence and persecution to suppress the Celtic people.

The respondent spoke of his own family and its Celtic roots. He pointed out that Celtic Christians believe in faith healing and that his mother and grandmother were active in faith healing practices. Both are still living in France and "practicing their ministry" on a discreet basis to avoid government attention. In contrast, the respondent believes he was more outspoken in defending Celtic culture. He believes that, since 1981, ethnic identity in Brittany is much more difficult as it is "totally choked" by the government. Despite this repressive atmosphere, the respondent decided to put Celtic faith healing on public display.

He became well known as a Celtic priest-healer, having become active in this profession after serving a considerable period of time as an officer in the French police

force. He stated that he resigned from the force of his own free will because he believed the government was oppressing the Celtic people and also because he wanted to carry on the family tradition of faith healing. He stated that his ethnic clan is well known in Brittany as spiritual healers and the notoriety attracted the attention of the government.

The respondent believes the French government is "the most totalitarian country after the Soviet Union." He asserted that, under French law, one cannot allude to god but only in a metaphysical way. He thinks that, if one speaks publicly about God in specific terms, this invokes government reaction that the speaker is committing a fraud.

The respondent advocates holistic medicine, that is, healing of the body through prayer and he thinks the government views this as a fraudulent scheme to bilk money from the public. As he gained more publicity because of his faith-healing activities, he decided to use his position to become a Celtic spokesman. He stated that many of his followers were those who were healed by following his practices. He became well known in the French media, appearing on French television. At one point in time, mail from the public at his office reached 1000 pieces per day, many from writers who wanted to be healed. He would cull out from the correspondence those he could help and he would accept monetary donations to his organization. The money was used to continue his holistic healing ministry and also to support various environmental goals. With the large number of donations,

however, government attention was attracted to his ministry and the authorities audited his office but did not discover any missing funds.

Later, however, government authorities decided to raid his offices and his records were thoroughly searched. The respondent feared that he was in danger of eminent arrest so he obtained travel documents and fled the country. He spent a short period in Greenland and then went to Canada. He then made arrangements to enter the United States by using a false passport. He testified that he regrets having used deceptive tactics to come to this country but asserts he did so only because he fears persecution in France. While he notes the extradition case against him failed, he insists that there is still a real danger that he would be persecuted by the authorities if he returned to France because they believe him to be a threat to national security due to his advocacy of Celtic rights.

In addition to his application, declaration and oral testimony, the respondent has presented a tremendous number of documents in support of his asylum claim. *Exhibit 12*. Much of this material is background in nature, and does not mention him specifically and, therefore, is not dispositive on the issue of asylum. *Matter of Exame*, 18 I&N Dec. 303 (BIA 1982). The materials are, however, admissible to show the background of his claim to asylum. *Id.* One document does mention him by name and extols his virtues as a Celtic priest-healer, but it is undated and unsigned. *Id.*, Item 2. Other materials talk about Breton history and living conditions in Brittany today. *Id.*, Items 3-5. Other documents speak of the yearnings of Celtic Bretons for autonomy. *Id.*, Items 8-11. The

packet of documents also contain a statement of Jean Pierre Tillenon, alias "Yann Ber," who claims to be a Celtic Breton who has suffered persecution at the hands of French government. *Id.*, Item 11. He declares that he was persecuted because he had tried to assist Black and Arabic Children in France.

Other materials speak of Yann Puilandre, a "Breton prisoner," who was jailed by the French government because of his efforts to teach the Celtic language in Bretany. *Id.* Item 12. Additional materials speak of "outlawed Breton Liberation Front" and report that several Bretons received jail sentences because of their activities on behalf of that organization. *Id.*, Item 13. There are reports of other ethnic strife in France generated by the insistence of the central government that all ethnic autonomy movements be suppressed. *Id.*, Item 16-17. I also note a publication that refers to the respondent as an ethnic priest-healer. *Id.*, Items 19-20.

Included also is a Memorandum Decision of the United State Magistrate Judge on the petition of the French government to extradite the respondent to France to face charges of fraud. *Id.*, Item 24. The Decision recites that the respondent is a faithhealer from Brittany who appeared on French television and discussed his claimed powers to heal sick people through prayer. The organization accepted money from seriously ill individuals in return for the respondent's faith healing services. Many people, however, were not healed and filed complaints with the French authorities. An investigative magistrate in Paris issued an international warrant for the arrest of the respondent for swindling persons in violation of Section 405 of the French Penal Code. The respondent was

arrested in California and held to answer the petition for extradition.

The decision points out that the respondent appeared on French national television and discussed his faith-healing procedures. As a result, millions of viewers wrote to him in hope of gaining his assistance. As testified to by the respondent, his organization would screen the inquiries and try to determine which among them could be helped by faith healing procedures. Apparently, there were large numbers of disgruntled patients who were not cured. They complained to the government, which charged the respondent with fraud and the unauthorized practice of medicine. By the time the charges were brought, however, the respondent had come to the United States and the extradition request was made.

The magistrate held that, in order to sustain extradition, he must find that the respondent acted with fraudulent intent. He found, however, that the extradition request did not contain sufficient evidence to demonstrate that the respondent acted with fraudulent intent in holding himself out to the French public as a priest-healer. Accordingly, and without making any finding as to the respondent's guilt or innocence under the pending French charges, the Magistrate denied the extradition request. The French government subsequently dropped its request for extradition.

In closing argument, the respondent asserted that he has demonstrated that Breton Celtic nationalists are subjected to government torture and imprisonment. He believes that the criminal charges against him were simply a smoke screen by the government to form a pretext

for his arrest in order to suppress his Celtic activities. He pointed to the testimony of Mr. Frank Thorton, a private investigator residing in California, who opined that the French government does not tolerate dissent and, in view of the respondent's history, he would certainly be subjected to persecution due to his ethnic origin and political stance as an advocate of Celtic autonomy. He also pointed out that, although the government's extradition request alleged that many people filed complaints against him, no evidence of those complaints has been forthcoming. Accordingly, he believes that the extradition request was simply a bogus ruse to get him back to France in order to persecute him.

Service counsel took another view of the record. He stated that it does not show that the respondent or his family were ever mistreated by the French government. He also stated that the record does not indicate that anyone who engaged in holistic medicine in Brittany has suffered persecution. Service counsel thinks that there is no evidence to show that the respondent's troubles in France stemmed from his ethnic identity. He also expressed doubt that Frank Thorton could be classified as an expert on French politics. Finally, counsel pointed out that the French government has withdrawn its extradition request and that Interpol has no outstanding arrest warrants for the respondent.

In assessing the respondent's case, it is first important to analyze the jurisprudence to determine the nature of "persecution" as that term is used in the asylum statute. While there is no precise definition of persecution in the Immigration and Nationality Act ("the Act"), it has been defined in the courts as the "infliction of suffering

or harm upon those who defer (in race, religion or political opinion) in a way regarded as offensive." *Kovac v. INS*, 407 F.2d 102 (CA9 1969). Persecution is punishment or the infliction of harm for political, religious or other reasons that are offensive. *Sivaainkaran v. INS*, 972 F.2d 161, 164 N. 2 (CA7 1992). The definition of persecution includes, at a minimum, conduct that threatens life or freedom. *Id.* In the context of the Act, persecution means punishment for political, religious or other reasons that our country does not recognize as legitimate. *Osaghae v. INS*, 942 F.2d 1160, 1163 (CA7 1991). Also, it is important to remember that, in determining whether there has been persecution, there must also be a determination whether the asylum applicant has been "singled out" for persecution. *Kotasz v. INS*, 31 F.3d 847, 851 (CA9 1994). Stated otherwise, the asylum applicant cannot simply show a generalized or random possibility of persecution in his native country. He must show that he is at particular risk – that his predicament is appreciably different from the dangers faced by his fellow citizens. *Id.*

It is also appropriate to explore the jurisprudence as to what actions do not constitute persecution within the meaning of the asylum statute. As a general rule, criminal prosecution is not persecution within the meaning of the asylum and withholding statutes unless it is politically motivated. *Kovac v. INS, supra; Soric v. INS*, 346 F.2d 360 (CA7 1965); *Matter of Massaud*, 14 I&N Dec. 429 (BIA 1973); *Matter of Janus and Janek*, 12 I&N Dec. 866 (BIA 1968). Accordingly, a criminal prosecution for violating Laws of General Applicability would not, without more, constitute a showing of attempted persecution. *Janusiak v. INS*, 947 F.2d 46, 48 (CA3 1991); *Benzadeour v. INS*, 946

F.2d 1351, 1353 (CA8 1991) (criminal prosecution or violating fairly-administered passport laws); *Matter of G--, Interim* Decision 3215 (BIA 1993), *Matter of Matelot, supra, Matter of Nagy,* 11 I&N Dec. 888 (BIA 1966) (criminal prosecutions for violating travel laws); *Matter of A--G--,* 19 I&N Dec. 502 (BIA 1987) (enforcement of national law requiring military service); *Matter of Canas,* 19 I&N Dec. 697 (BIA 1988), (government's extralegal recruitment for military service); *Blanco-Lopez v. INS,* 858 F.2d 531 (CA9 1988) (goverment's legitimate investigation of subservice activity); *Sagermark v. INS,* 767 F.2d 647 (CA9 1985) (claim that criminal prosecution was government frame-up attempt, even if true, does not constitute persecution within the meaning of the statute).

In this case, I agree with the Service view of the evidence. The record indicates the respondent was not treated as a downtrodden French citizen of Celtic origin. There is no indication that he was treated in discriminatory fashion by the French government. There is no hint that he was deprived of the necessities of life. In fact, he was able to attend a university and complete his studies. Also, the record indicates the respondent served the government for many years as an officer in the French Police. There is no indication that, during his time in uniform, the government ever mistreated him or discriminated against him because of his Celtic origin. The record indicates that he ended his police service of his own volition and not because of any action by the authorities.

With regard to his activities as a holistic healer, there is no indication that the French government is anti-religion or that it has embarked upon a pogrom of persecuting those who are religiously active in a public way. In

fact, government attention seems to have focused on the respondent only after receiving complaints of citizens who believed they were bilked out of money. According to these individuals, they believed they had paid money in return for healing and did not get it. Feeling cheated, they complained to the authorities who launched an investigation that resulted in criminal charges being filed. While it is true that the specific complaints of these individuals are not a matter of record, it would appear plausible and realistic that such complaints could have been made in view of the sequence of events in France prior to the respondent's departure. He had gained public notoriety as a holistic healer and appeared on French television. Millions of people wrote in response to his appearance. There is no indication that the criminal prosecution was a "put-up job" by the government, simply to gain jurisdiction over the respondent and persecute him because of his politics or ethnic activities. *Sagermark v. INS, supra.*

Moreover, I do not view the background materials as showing a pattern of persecution of Celtic Bretons in France. There is indication that Celtic Bretons have been jailed because of their suspected connection with the Breton Liberation Front and the materials suggest that this entity employs violent means in order to advance its political agenda. The respondent has not proven that the French Republic has (or seeks) to "persecute" him. There is not hint that the has been linked to the Breton National Liberation Front nor is there a showing that the respondent has been active in publicly promoting a Celtic nationalist agenda. His publicity stemmed from his fame as a faith healer and not as a Celtic nationalist. The

United States Supreme Court has held that, for an alien to show a well-founded fear of persecution, there must be some evidence, either direct or circumstantial, that he is in danger of mistreatment on one of the five asylum grounds. *INS v. Elias-Zacarias*, ___ U.S. ___, 112 S.Ct. 812 (1992). The respondent has not presented such evidence.

Furthermore, he has failed to prove that the criminal prosecution contemplated by the French authorities was (or is) based on his race or any other asylum ground. The respondent gained national television fame and millions of viewers wrote to him for help. Many also sent monetary donations which he accepted. Some later complained to the authorities that, after paying money, they were not helped. The government launched an investigation and later filed charges. This sequence of events is not far-fetched or implausible but quite realistic. It does not show a persecution motive by the government. *Saermark v. INS, supra.*

As matters stand today, the French government has withdrawn its request for the respondent's extradition. Interpol, the international law-enforcement agency, does not have on file a warrant for his arrest. His children, former wife, mother and grandmother all reside in France and there is no inkling that the authorities have jailed, molested, tortured, persecuted, or harassed them because of the respondent's activities. Granted, like all governments, the modern-day French Republic may have many political failings but the evidence does not establish that persecution of French citizens of Celtic origin is one of these. All facts carefully considered, I cannot agree that the respondent has demonstrated either a permissible inference of past persecution or well-founded fear of

future persecution in France under any of the five grounds enumerated in the asylum statute. Accordingly, his request for asylum must be denied.

As stated earlier, the asylum request is deemed a simultaneous request for the withholding of deportation remedy. As stated earlier, the respondent has failed to demonstrate that the French government has ever taken any action against him, or contemplates any action against him, because of his race, religion, political opinion, nationality, or membership in a particular social group. Without this showing, the withholding application also fails. *INS v. Elias-Zacarias, supra.* Accordingly, the withholding claim must also be rejected.

Failing asylum and withholding, the only other remedy to allow the respondent to avoid deportation would be voluntary departure. I find the respondent statutorily eligible for this relief but the question presented is whether he should receive it in the exercise of discretion. The Service stands in opposition, pointing out that he used a false passport to gain entry to this country and later used it to visit Mexico and return to the United States. Granted, use of a false passport is an adverse fact to be considered in resolving the voluntary departure discretionary issue. *Compare Matter of Shirdel,* 19 I&N Dec. 28 (BIA 1984) (use of false passport to enter the United States is an adverse fact in evaluating the question of asylum discretion). However, I point out that my rejection of the respondent's asylum claim does not mean that I find him to be insincere in presenting it. He struck me as a sincere witness and I do not believe he entered this country in order to present a bogus asylum request. He has no criminal convictions and is not married to a lawful

permanent resident immigrant who may be in a legal position to petition for his immigrant visa. All facts considered, I do not believe the interest of justice will be damaged if he is granted the minimal remedy of voluntary departure.

IT IS HEREBY ORDERED that the respondent herein is denied asylum and withholding of deportation but granted, in lieu of an order of deportation, the privilege of departing this country voluntarily and at his own expense, such departure to take place at any time on or before August 29, 1995 or any extension beyond that date as may be granted by the Service District Director. He must leave under such conditions as the Director may chose to impose.

IT IS FURTHER ORDERED that, should he fail to leave voluntarily when and as required, he will lose the voluntary departure privilege without any notice or hearing and this order shall become effective at once: He shall be deported from the United States to France on the charge of deportability contained in his Order to Show Cause.

/s/ Robert J. Barrett
Robert J. Barrett
Immigration Judge

Supreme Court, U.S.
FILED
SEP 5 2000
CLERK

(2)

No. 99-1932

In the Supreme Court of the United States

PHILIPPE SAUVAGE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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1 APP

QUESTIONS PRESENTED

1. Whether the court of appeals erred in determining that substantial evidence supports the Board of Immigration Appeals' decision that petitioner's prosecution by the Government of France for fraud and swindling did not constitute persecution.

2. Whether the court of appeals erred in not remanding petitioner's case and ordering the Board of Immigration Appeals to consider new evidence.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Boag v. *MacDougall*, 454 U.S. 364 (1982)	7
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999)	7
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987)	3
INS v. *Elias-Zacarias*, 502 U.S. 478 (1992)	3, 7, 8
INS v. *Stevic*, 467 U.S. 407 (1984)	3
Molinaro v. *New Jersey*, 396 U.S. 365 (1970)	10
Molko v. *Holy Spirit Ass'n*, 762 P.2d 46 (Cal. 1988), cert. denied, 490 U.S. 1084 (1989)	10
New Haven Inclusion Cases, 399 U.S. 392 (1970)	8
Petition of France for the Extradition of Sauvage, In re, 819 F. Supp. 896 (S.D. Cal. 1993)	2, 9
Russell v. *Southard*, 53 U.S. 139 (1851)	8
Sauvage v. *Reno*, No. 00-1134-IEG (AJB) (S.D. Cal. June 23, 2000)	6
Watt v. *Alaska*, 451 U.S. 259 (1981)	7

Statutes:

8 U.S.C. 1101(a)(42)(A) (1994 & Supp. IV 1998)	2
8 U.S.C. 1158(a) (1994 & Supp. IV 1998)	2-3
8 U.S.C. 1253(h)	3

Miscellaneous:

Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (1992)	7

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-9) is not reported, but the judgment is noted at 199 F.3d 1333 (Table). The opinions of the Board of Immigration Appeals (Pet. App. 10-20 and 21-30) are not reported.

JURISDICTION

The court of appeals entered its judgment on September 17, 1999. A petition for rehearing was denied on March 3, 2000. Pet. App. 1-2. The petition for a writ of certiorari was filed on June 1, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of France. Pet. App. 3. Petitioner is a Celtic faith healer who supports the ethnic rights of the Celtic people in the French province of Brittany. *Id.* at 34. In the early 1990s, French officials received approximately 200 complaints from persons who had paid petitioner money for his unsuccessful healing services. See *In re Petition of France for the Extradition of Sauvage*, 819 F. Supp. 896, 897 (S.D. Cal. 1993). They opened an inquiry, and a French investigating magistrate subsequently issued an international warrant for the arrest of petitioner for fraud and swindling, in violation of Section 405 of the French Penal Code. *Ibid.* Fearing his imminent arrest, petitioner left his wife and five children in France and fled to Greenland and, from there, to Canada. Pet. App. 19, 38. In 1992, petitioner twice entered the United States by using a falsified passport. *Id.* at 3, 31, 46.[1] In October 1992, he was arrested in the United States on the basis of an extradition request from France.[2]

In February 1993, the Immigration and Naturalization Service commenced deportation proceedings against petitioner. Pet. App. 31-32. Petitioner admitted that he had entered the country on a false passport, and applied for asylum and withholding of deportation.[3]

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[1] Petitioner has never alleged that he made his fraudulent entry into the United States because he could not have remained safely in Canada.

[2] A magistrate judge denied extradition. *In re Petition of France for the Extradition of Sauvage*, 819 F. Supp. 896 (S.D. Cal. 1993).

[3] To qualify for asylum, an alien must show persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. See 8 U.S.C. 1101(a)(42)(A), 1158(a) (1994 & Supp. IV

The immigration judge denied asylum and withholding of deportation on the ground that the petitioner had not demonstrated a clear probability or well-founded fear of persecution if returned to France. The immigration judge concluded that his prosecution by the French government for fraud reflected the proper enforcement of a valid criminal law rather than a veiled effort to persecute petitioner on the basis of religion or political opinion. *Id.* at 42-46.

2. Petitioner appealed to the Board of Immigration Appeals (Board). While his appeal was pending, he filed a motion to remand the case so that he could apply for adjustment of status based on his intervening marriage to a lawful permanent resident. The Board dismissed the claims for asylum and withholding of deportation and denied the motion to remand. Pet. App. 22-30. The Board found that much of the evidence petitioner submitted to show a reasonable fear of persecution based on his Celtic ethnicity and religion lacked credibility and was improperly translated. *Id.* at 24-25.[4] The Board further ruled that the prosecution of petitioner for fraud and swindling was legitimate and was not a pretext for religious or political persecution.

1998); *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481-482 (1992). To qualify for withholding of deportation, an alien must show that it is more likely than not that his life or freedom would be threatened upon return "on account of race, religion, nationality, membership in a particular social group, or political opinion." See 8 U.S.C. 1253(h); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430 (1987); *INS* v. *Stevic*, 467 U.S. 407, 413 (1984).

[4] The Board noted that many of the documents were translated by petitioner's first wife and lacked a translator's certification, and further that, in most instances, the translator "added emphasis and/or explanatory notes, which suggests that the documents were in effect edited." Pet. App. 24.

Id. at 26-28. The Board noted that, despite his national reputation as a "Celtic spiritual leader and healer," petitioner had never been arrested or otherwise bothered by French officials prior to their receipt of hundreds of fraud complaints from angry citizens. *Id.* at 27 & n.7. The Board denied the motion to remand on the ground that petitioner is ineligible for adjustment of status because he "procured his admission into the United States through fraud or willful misrepresentation." *Id.* at 29.

3. Petitioner appealed the dismissal of his asylum and withholding of deportation claims, but not the denial of his motion to remand, to the United States Court of Appeals for the Ninth Circuit. While that appeal was pending, petitioner moved the Board to reopen his case and remand it to permit him to apply for a waiver of inadmissibility and adjust his status to that of lawful permanent resident based on his marriage. Pet. App. 10-11. The Board denied the motion. *Id.* at 10-20. The Board first noted that, in addition to his false entry into the United States, petitioner "is an admitted bigamist," having married a second wife in the United States while still married to his first wife in France. *Id.* at 12. The Board concluded that bigamy was a crime of moral turpitude, further disqualifying petitioner from adjustment of status. *Id.* at 14-15.

In addition, the Board ruled that petitioner had failed to establish that his third wife and their children would suffer extreme hardship if he were deported. The Board found the unsworn declaration of petitioner's third wife to be of little probative value, *id.* at 15-16, especially because she married petitioner while his deportation proceedings were pending and thus "knowing that he was a fugitive who faced deportation back to France," *id.* at 17. The Board further found insufficient

to constitute "extreme hardship" petitioner's wife's reluctance to follow her husband back to France and her concerns that his imprisonment would require her to obtain work outside the home, forcing her children "to undergo the 'extremely traumatic' experience of having the children cared for by a babysitter or in a day care center." *Id.* at 16. Finally, the Board ruled that, in any event, it would deny the adjustment of status in the exercise of its discretion, because petitioner did not marry his current wife until "after the commencement of deportation proceedings against him," committed bigamy at the very time his first wife was helping him with his asylum application, and gave false testimony at his deportation proceeding. *Id.* at 19-20. The Board concluded that "we do not consider the [petitioner] desirable as a permanent resident of the United States." *Id.* at 20.

4. The court of appeals affirmed. Pet. App. 3-9. The court held that substantial evidence supported the Board's conclusions both that the documentary evidence petitioner submitted was not credible and that his criminal prosecution in France did not amount to persecution. *Id.* at 5-7. In particular, the court agreed that the record "supports the [Board's] finding that this was a bona fide prosecution." *Id.* at 7. The court also affirmed the denial of petitioner's motion to reopen, noting that the Board "reasonably concluded" that petitioner's wife would not be forced to remain in the United States and that "any family separation occurring in Europe would result from [petitioner's] criminal prosecution for fraud." *Id.* at 8. The court also sustained the discretionary denial of adjustment of status based on petitioner's repeated fraudulent entries into the United States. *Id.* at 9.

5. While his petition for rehearing was pending, petitioner moved for a temporary stay to obtain his French criminal records and, in the alternative, asked that the case be remanded to the Board for reconsideration in light of those records. The court of appeals denied rehearing, as well as the requested stay and remand. Pet. App. 1-2.

In May 2000, petitioner filed a second motion to reopen with the Board and again requested a stay of deportation on the ground of "new" evidence that he had been convicted of fraud *in absentia* in France in 1995 and sentenced to five years' imprisonment. The application for a stay was denied; the motion to reopen is pending. Pet. 11.

Petitioner filed a second request for a stay from the court of appeals, which was denied. Pet. 12 n.19. Petitioner failed to report to the INS for deportation, as required, on June 23, 2000, and remains at this time a fugitive.[5]

ARGUMENT

1. Petitioner contends that the court of appeals erred in holding both that the French government's prosecution of him for fraud and swindling was not persecution (Pet. 14-18) and that he was not being persecuted "on account of Religion" (*id.* at 18-28). Neither of those claims merits this Court's review. Petitioner does not contend that the court of appeals' ruling conflicts with any decision of this Court or the other courts of appeals. Nor does petitioner disagree with the general legal standard that the court of

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[5] A district court declined to grant Sauvage a preliminary injunction against deportation because "Sauvage flouts his legal obligations." *Sauvage* v. *Reno*, No. 00-1134-IEG (AJB) (S.D. Cal. June 23, 2000), slip op. 5.

appeals applied to his case, agreeing that "persecution is not the same as 'punishment for a common law offense.'" Pet. 16; see also *id.* at 14 (conceding that, "[a]s a general matter, * * * the Board has held that fear of prosecution for violations of *fairly administered laws* does not itself qualify one as a 'refugee' or make one eligible for withholding of deportation").[6]

Petitioner simply disagrees with the outcome of the court's application of that legal test to the particular facts of his case. This Court's certiorari jurisdiction, however, "is designed to serve purposes broader than the correction of error in particular cases." *Watt* v. *Alaska*, 451 U.S. 259, 276 n.5 (1981) (Stevens, J., concurring); see also *Boag* v. *MacDougall*, 454 U.S. 364, 367-368 (1982) (Rehnquist, J., dissenting) ("this Court is not a forum for the correction of errors"). That is particularly true when three different adjudicatory forums already have consistently and harmoniously rejected petitioner's fact-bound claims. Petitioner's claims, in other words, do not present any legal issues of broad or enduring importance that merit this Court's review.

2. The court of appeals' holding that petitioner did not satisfy his burden of proving persecution was,

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[6] Petitioner suggests (Pet. 16-17) that the court's decision failed to apply the analysis proposed by the Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (1992). That argument is unavailing. This Court recently held that the Handbook "is not binding on the Attorney General, the [Board], or the United States courts." See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 427 (1999). Furthermore, while petitioner implies that the Handbook supports his claim, he fails to establish that anything in the Handbook would "compel[]" the court of appeals to conclude that the French government was persecuting him by prosecuting him for fraud. See *INS* v. *Elias-Zacarias*, 502 U.S. 478, 484 (1992).

moreover, correct. Substantial evidence supported the Board's conclusion that petitioner failed to show that (1) France's law against fraud and swindling was not facially neutral,[7] (2) the law in question was selectively or disproportionately enforced against religious minorities or political dissidents,[8] or (3) petitioner was ever

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[7] Article 405 of the French Penal Code provides:

> Anyone, either using false identities or titles, or acting fraudulently to persuade others of the existence of false companies, of an imaginary power or credit or to raise up hopes or fears of success, of accidents or all other chimerical event, will have obtained or tried to obtain funds, furniture, bonds, notes, agreements, receipts, and will have through one of these means swindled or attempted to swindle totally or partially someone's wealth will be condemned to imprisonment for one to five years at the most and to pay a fine of at least 3600 francs and 2,500,000 francs at most.

Sauvage, 819 F. Supp. at 900 n.2.

[8] Although petitioner complains to this Court (Pet. 21-23) about the five-year sentence imposed—which was within the range authorized by the statute—and cites three reports on country conditions in France alleging that France persecutes some (unspecified) minority religions, none of that evidence was presented to the Board or the court of appeals. See, *e.g.*, *New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970) ("None of this is record evidence, and we do not consider it."); *Russell* v. *Southard*, 53 U.S. 139, 159 (1851) ("This court must affirm or reverse upon the case as it appears in the record. We cannot look out of it, for testimony to influence the judgment of this court sitting as an appellate tribunal. And, according to the practice of the court of chancery from its earliest history to the present time, no paper not before the court below can be read on the hearing of an appeal."). Nor, in any event, is petitioner's newly supplemented showing "so compelling that no reasonable factfinder could fail to find" (*Elias-Zacarias*, 502 U.S. at 484) that France's prosecution of petitioner is a facade for religious persecution. While his co-defendants—who remained in France to face the charges against them—received lesser sentences, petitioner does not contend that the French government

harassed or threatened because of his religious or political beliefs, or had any untoward encounter with any branch of the French government prior to that government's receipt of hundreds of fraud complaints against him.[9]

Petitioner asserts (Pet. 5, 21-22) that he had no intent to defraud. That argument, of course, was available for petitioner to present as a defense to his criminal prosecution in France, had he not fled to avoid the prosecution. Beyond that, petitioner fails to show either that the record compels the conclusion that he lacked fraudulent intent or that, even if true, France's alleged mistake in prosecuting him transforms his conviction into religious persecution.[10]

Petitioner further asserts (Pet. 21-22) that his religious activity "would be wholly protected religious expression in this country and under well-established

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has any record or practice of imposing five-year sentences for fraud exclusively on religious minorities or political dissidents.

[9] In fact, petitioner testified that he had been a member of the French police force for a number of years. Pet. App. 43.

[10] The magistrate judge's extradition decision is not to the contrary. Cf. Pet. 7. In denying extradition, the magistrate judge held only that, "[u]nder both the French swindling statute and the American statutes prohibiting false advertising and theft, a knowledge or intent requirement must be proved in order to convict," see *Sauvage*, 819 F. Supp. at 900, but that on the limited record presented, the magistrate judge could not discern whether the French magistrate had sufficient evidence of intent, *id.* at 901-902. Indeed, the magistrate judge acknowledged that "the French magistrate may very well have made [the finding of fraudulent intent] based on sufficient evidence," but that the magistrate judge could not "simply adopt that conclusion." *Id.* at 903. The magistrate judge thus held neither that petitioner was innocent of fraud nor that the French government was prosecuting petitioner in bad faith.

international norms." First, even if true, that argument would not compel the Board to conclude that France is persecuting petitioner because of his religion. Second, defrauding hundreds of people out of large sums of money is not religious expression under the laws of this country or international norms. See, *e.g.*, *Molko* v. *Holy Spirit Ass'n*, 762 P.2d 46, 56-58 (Cal. 1988) (en banc), cert. denied, 490 U.S. 1084 (1989).

3. Petitioner also seeks (Pet. 28-30) this Court's review of the court of appeals' refusal to remand his case and to order the Board to consider his "new" evidence—a French court decree finding him guilty *in absentia*—which predated by two years the Board's decision in his case. The court of appeals' decision denying the motion to remand does not conflict with any decision of this Court or the other courts of appeals; the ruling has no consequence beyond this particular case. In fact, the denial of the remand has little impact even on petitioner's case because petitioner already has filed a separate motion to reopen directly with the Board based on his 1995 evidence, and that motion remains pending.

Finally, petitioner's claims do not warrant an exercise of this Court's certiorari jurisdiction in light of his present fugitive status. See n.5, *supra*, and accompanying text; cf. *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970) (convicted defendant's fugitive status "disentitles the defendant to call upon the resources of the Court for determination of his claims").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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